Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PELLA CORPORATION AND
PELLA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA,
AND WILLIAM AND NANCY EHORN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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September 13, 2010

QUESTIONS PRESENTED

1. Whether a court may certify an "issue" class under Rule 23(b)(3) to adjudicate discrete issues that will not establish liability for any claim.

2. Whether a court may certify an "issue" class under Rule 23(b)(2) to adjudicate discrete issues that will not result in final declaratory relief.

3. Whether a court may certify a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Pella Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Pella Windows and Doors, Inc. is a wholly-owned subsidiary of Pella Corporation.

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INTRODUCTION

Class actions seek to promote efficiency by allowing one or more representative plaintiffs to pursue claims on behalf of an entire class. But class actions are subject to abuse when a named plaintiff pursues claims that cannot be established on a classwide basis. Under these circumstances, class certification promotes inefficiency, as well as unfairness, by multiplying proceedings and allowing a named plaintiff to conjure up a ghost army of absent class members whose claims the named plaintiff—and his attorneys—have no right to pursue.

Rule 23 seeks to prevent such abuse by allowing certification only where the named plaintiff can establish liability or entitlement to relief on a classwide basis—*i.e.*, by proving his or her own individual claims, the named plaintiff also would prove the claims of absent class members. If absent class members must still pursue individual proceedings to establish liability or entitlement to final relief, class certification is unwarranted. Rule 23(b)(3) accomplishes this objective in opt-out classes by specifying that certification is warranted only when common issues "predominate" over individual issues. And Rule 23(b)(2) accomplishes this objective in non-opt-out classes by specifying that certification is warranted only when the named plaintiff seeks "final" injunctive or declaratory relief on behalf of the class as a whole. The upshot of both provisions is the same: a court cannot certify a class merely to litigate one or more discrete issues that will not establish liability or entitlement to final relief on a classwide basis.

The lower courts in this case missed this fundamental point, and thereby distorted Rule 23 and departed from the path other courts have followed in addressing these important class-action questions. The district court recognized that the named plaintiffs here cannot prove their state-law consumer-fraud claims on a classwide basis because certain issues (including the bedrock issue of causation) must be proved on an individual basis. The court nonetheless certified "issue" classes under both Rule 23(b)(2) and Rule 23(b)(3) that cannot establish liability or entitlement to final relief on a classwide basis, and thus will not eliminate the need for individual proceedings. And the Seventh Circuit affirmed certification of both the Rule 23(b)(2) and 23(b)(3) classes on the ground that it "makes good sense" to resolve particular discrete issues on a classwide basis "while leaving the remaining, claimant-specific issues to individual follow-on proceedings." App. 7a (internal quotation omitted).

The lower courts, moreover, exacerbated these errors by allowing certification of a nationwide "issue" class under Rule 23(b)(2) without analyzing the underlying substantive state laws to determine whether they are consistent. Until this case, it had been settled law for a generation that certification of a nationwide class to pursue state-law claims is *per se* impermissible without careful analysis of the underlying state laws to determine consistency. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides no basis for bypassing such analysis; to the contrary, that Act simply creates a federal-law mechanism for the declaration of substantive rights, but does not itself create any such rights.

At the end of the day, this case underscores the wisdom of this Court's observation that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (internal quotation and brackets omitted). By endorsing the certification of "issue" classes that will not establish liability or entitlement to final relief on a classwide basis, the Seventh Circuit departed from the plain language of Rule 23 and stretched class certification beyond all bounds of principle and precedent. Because the decision below is incorrect, and fosters instability and confusion in an important area of the law, this Court should grant review.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 606 F.3d 391 and reprinted in the Appendix ("App.") at 1-11a. The Seventh Circuit's unreported order denying rehearing is reprinted at App. 12-13a. The district court's opinion is reported at 257 F.R.D. 471 and reprinted at App. 46-84a.

JURISDICTION

The Seventh Circuit issued its decision on May 20, 2010, and denied a timely rehearing petition on June 14, 2010. App. 1a, 12a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT RULE PROVISIONS

Rule 23 provides in relevant part:

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

Fed. R. Civ. P. 23.

STATEMENT OF THE CASE

A. Background

The case involves approximately six million aluminum-clad wood casement windows manufactured and sold by petitioners Pella Corporation and Pella Windows and Doors, Inc. (collectively Pella) across the Nation from 1991 until 2009. App. 1a, 19a, 21a. Although these windows were sold under the "ProLine" name, there were substantial changes over the years to the design of the windows and their recommended installation methods, maintenance requirements, and warranty.

Like other organic products, these wood windows may deteriorate as the result of any number of factors, including improper installation, when exposed to the elements. App. 7a, 21-22a, 30-31a, 61a, 80a. Pella provided a warranty on the windows, which was extended to ten years during the period at issue here, and in 2006 established a Service

Enhancement Program, which reimbursed distributors for labor costs associated with replacing windows under the warranty and partially subsidized the cost of replacing windows for five years after the warranty's expiration. App. 22a, 47a.

Respondents are individuals who own Pella aluminum-clad wood casement windows in their homes. Respondents Leonard E. Saltzman (who lives in Illinois), Kent Eubank (who lives in Iowa), and Thomas Riva (who lives in Florida), own Pella ProLine windows. App. 90-93a. Respondents William and Nancy Ehorn (who live in California) own Pella Architect, not ProLine, windows. App. 94a.[1]

B. Proceedings Below

Respondents brought this nationwide class action in 2006, alleging that the Pella aluminum-clad wood casement windows in their homes are unreasonably susceptible to moisture penetration and deterioration, and hence defective. Respondents did not, however, bring product-defect claims; instead, respondents brought state-law consumer-fraud claims, alleging that Pella's failure to notify them of the alleged defect violated their rights under the consumer-fraud statutes of their various States. Although respondents' claims arise under state law, they properly invoked federal jurisdiction under the

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[1] The complaint, as amended, included two other named plaintiffs, Lubo and Maria Hadjipetkov, who lived in New Jersey and owned Pella Architect, not ProLine, windows. App. 86a, 93a. They subsequently sought and were granted leave voluntarily to dismiss their claims.

Class Action Fairness Act, codified in relevant part at 28 U.S.C. § 1332(d), because this is a putative class action of more than 100 members in which the parties are at least minimally diverse and the amount in controversy exceeds $5 million. App. 87a.

Respondents thereafter moved for certification of several classes of owners of Pella ProLine casement windows, and the district court (Zagel, J., N.D. Ill.) granted the motion in relevant part. The court certified two separate and distinct classes: (1) an opt-out class seeking money damages under Rule 23(b)(3) under the consumer-fraud statutes of California, Florida, Illinois, Michigan, New Jersey, and New York consisting of those persons "whose windows have exhibited wood rot and who have replaced the affected windows," App. 51a, 84a, and (2) a nationwide non-opt-out class seeking declaratory relief under Rule 23(b)(2) consisting of those persons who owned "windows that have not manifested the alleged defect and [those persons] whose windows have some wood rot but have not yet been replaced," App. 51a, 83-84a.

With respect to the Rule 23(b)(3) class, the court held that respondents satisfied the threshold "commonality" requirement of Rule 23(a) based on the underlying question whether the Pella ProLine casement windows are defective. App. 58-61a. The court then declared that the commonality analysis of Rule 23(a) essentially satisfied the predominance requirement of Rule 23(b)(3). "Considerable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality,

predominance is found where there exists a common nucleus of operative facts." App. 73-74a (internal quotation omitted).

The court conceded that respondents could not prove their consumer-fraud claims on a classwide basis, because those claims involved issues (like the bedrock issue of causation) that are inherently individualized. The court, however, dismissed causation as a "damages," as opposed to a "liability," issue. "It is clear that in many instances, inspection will be required, and individual inquiries will predominate. However, the fact that proving damages must be handled individually does not preclude certification on the issue of liability." App. 80a; *see also* App. 60a ("[T]he inquiry with regard to damages and causation is too individualized" for class adjudication); App. 61a ("I decline to certify a class for the issues of causation and damages."); App. 80-81a n.13 ("I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue."); App. 83a ("I am certifying the consumer fraud class as to the issue of liability only, and damages will be handled individually."). Because the court believed that it was carving at the joint by separating a determination of "liability" from "damages," the court further rejected Pella's argument that having different juries address different elements of liability (such as product defect and causation) would violate the Seventh Amendment's re-examination provision. App. 83a.

The court acknowledged that the consumer-fraud statutes of the various States differ, so that it was necessary to divide the Rule 23(b)(3) class into

different subclasses. App. 74-78a & n.12. Accordingly, the court certified subclasses for claims under California, Florida, Illinois, Michigan, New Jersey, and New York law. *See id.*; *see also* App. 51a, 84a.

With respect to the Rule 23(b)(2) class, the court held that non-opt-out certification was warranted because respondents sought only declaratory relief in the form of six "Declarations" regarding discrete issues.[2] None of the requested Declarations,

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[2] The requested Declarations are as follows:

Declaration I: The Court finds that all Pella ProLine aluminum clad casement windows, manufactured from 1991 to present, have a defect in the aluminum cladding of the sash component that allows water to get behind the aluminum cladding resulting in premature rotting of the wood component of the sash which wood rot may progress to adjacent wood components. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure to all of these windows.

Declaration II: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine aluminum clad casement windows manufactured from 1991 to 2003. All persons who owned structures containing ProLine casement windows manufactured from 1991 to 2003 were eligible for this program. Pella however did not disclose to the persons eligible either the existence of the enhancement of their warranties, the limited remediation available, or that the windows covered by the program were defective in material and workmanship when manufactured.

Declaration III: The Court finds that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component, which rot may progress to adjacent wood

components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella.

Declaration IV: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine transom, awning and casement windows manufactured from 1991 to 2003. Only persons who owned structures containing ProLine transom, awning and casement windows manufactured from 1991 to 2003 and who repeatedly complained to Pella were purportedly included in and eligible for this program. Because the Court has determined that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component against reasonable expectations, and because the Court has found that Pella knew of this defect when it first manufactured these windows, the Court finds that the Pella Service Enhancement Program is insufficient to remediate the defects know by Pella to exist. The Court therefore declares that Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid, and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation.

Declaration V: The Court declares that Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to ProLine window wood rot, whether internally coded by Pella as 06 or similar.

Declaration VI: The Court declares that Pella shall establish an inspection program and protocol to be communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a

however, would entitle any class member to final relief. Indeed, as the district court noted, respondents themselves acknowledged that the Declarations "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a.

The district court did not, in analyzing certification of the proposed nationwide non-opt-out class under Rule 23(b)(2), analyze the underlying state laws under which their claims arose to determine consistency. Rather, the court apparently accepted respondents' argument that because they sought declaratory relief under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, their claims arose under uniform federal law.

Pella timely sought review of the class certification order Fed. R. Civ. P. 23(f). *See* App. 14-45a. The Seventh Circuit called for a response to the petition, and then—without any additional briefing or oral argument—both granted the petition and affirmed the certification order. *See* App. 1-11a.

The Seventh Circuit affirmed certification of the Rule 23(b)(3) class on the ground that the issue of "defect" predominated, even though any individual plaintiff would still have to prove causation, so that liability could not be established on a classwide basis. "We ... hold that the district court properly ... exercised its discretion to conclude that the common

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Special Master appointed by the Court and/or agreed to by the parties.

App. 48-50a n.3.

predominant *issue* of whether the windows suffer from a single, inherent design defect leading to wood rot is the *essence* of the dispute and is better resolved by class treatment." App. 5a (emphasis added). The appellate court noted with approval that "[t]he district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the *central* questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." App. 6a.

The Seventh Circuit acknowledged that the causation inquiry in this case "is necessarily an individual issue." App. 7a; *see also id.* ("Under the district court's plan, class members still must prove individual issues of causation and damages."). The appellate court nonetheless asserted that "the need for individual proof alone does not necessarily preclude class certification." *Id.* "A district court has the discretion to split a case by certifying a class for some *issues*, but not others, or by certifying a class for liability alone where damages *or causation* may require individualized assessments." *Id.* (emphasis added). Like the district court, the Seventh Circuit dismissed Seventh Amendment concerns on the ground that the class jury would be asked to decide different issues than subsequent juries in individual cases. App. 9-10a.

The Seventh Circuit also affirmed certification of the nationwide non-opt-out Rule 23(b)(2) class of all

Pella ProLine window owners. App. 8-9a. The court noted that the Rule 23(b)(2) class seeks declaratory relief only, even though it does not seek (as the Rule requires) "final" relief; any individual plaintiff would still have to prove causation if and when a defect manifested itself. App. 8a. According to the Seventh Circuit, such persons (whose windows either had not manifested any defect or who had not replaced their windows) "would want declarations that there is an inherent design flaw, that the warranty extends to them and specific performance of the warranty to replace the windows when they manifest the defect, or final equitable relief." *Id.*

The Seventh Circuit did not address Pella's argument that the nationwide Rule 23(b)(2) class was inappropriate because the district court had not analyzed the underlying laws of the fifty States for consistency. Rather, the court apparently dismissed this argument as one of several "minor concerns that relate primarily to the manageability of the class." App. 10a. "Under Rule 23," the court declared, "district courts are permitted to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Id.* (internal quotation omitted).

The Seventh Circuit denied a subsequent petition for rehearing, *see* App. 12-13a, and this petition follows.

REASONS FOR GRANTING THE WRIT

I. A Court May Not Certify An "Issue Class" Under Rule 23(b)(3) To Adjudicate Discrete Issues That Will Not Establish Liability For Any Claim.

The Seventh Circuit erred, and intensified an existing conflict among the circuits, by holding that it was appropriate for the district court to certify an "issue" class under Rule 23(b)(3), even though resolution of the specified issues—the existence of an alleged design defect in Pella's ProLine casement windows, and Pella's response to that alleged defect—would not establish liability for respondents' consumer-fraud claims on a classwide basis. Under Rule 23(b)(3), the presence of one or more common issues is not enough to warrant class certification. To the contrary, such common issues must "*predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added), and—as most circuits to have addressed the issue have held—common issues cannot "predominate" as a matter of law where, as here, one or more essential elements of liability (such as causation, injury, or reliance) must be proved on an individual basis in subsequent proceedings.

It is simply not true, as the district court held, that "[a] finding of commonality [under Rule 23(a)] will likely satisfy a finding of predominance" under Rule 23(b)(3). App. 73-74a. To the contrary, as this Court and others have explained, the predominance requirement "is far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 624; *see also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270, 1278-79 (11th Cir. 2009); *Steering*

Committee v. Exxon Mobil Corp., 461 F.3d 598, 601-02 (5th Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001). The existence of one or more common issues under Rule 23(a) is necessary, but not sufficient, to warrant class certification; the whole point of the predominance requirement of Rule 23(b)(3) is to ensure that classwide adjudication of a common issue or issues is worth the candle. *See* Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(3) ("It is only where this predominance exists that economies can be achieved by means of the class-action device."). A court thus cannot "bootstrap" a finding of commonality under Rule 23(a) into a finding of predominance under Rule 23(b)(3). *See, e.g.*, *Vega*, 564 F.3d at 1277-79.

The district court in this case, however, did just that, and the Seventh Circuit blessed that decision. *See* App. 73-74a, 5-7a; *see also* App. 4a (noting that "the district court explicitly declined to certify issues related to causation, damages, and statute of limitations"); App. 6-7a (where there are "common issues," it "makes good sense ... to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings") (internal quotation omitted). According to the Seventh Circuit, the district court properly concluded that "the common *predominant* issue" of design defect "is the *essence* of the dispute," and outweighed the individualized elements of the consumer-fraud claims (including causation) that every class member would need to prove to establish liability. App. 5a (emphasis added); *see also* App. 6a (asserting that "the *central* questions in the litigation

are the same for all class members") (emphasis added).

By endorsing such non-dispositive "issue" classes under Rule 23(b)(3), the Seventh Circuit gutted the "predominance" requirement and deepened a circuit conflict. As the Fifth Circuit has explained, the predominance requirement ensures that commonality governs *a claim as a whole*. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 745 n.21 (5th Cir. 1996) ("[A] cause of action, *as a whole*, must satisfy Rule 23(b)(3)'s predominance requirement.") (emphasis added); *see also Steering Committee*, 461 F.3d at 601 (same); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (same). For most claims (including those at issue here), alleging that a defendant engaged in a common course of wrongdoing takes a plaintiff only so far; the plaintiff generally must prove additional elements of a claim (such as causation, injury, or reliance) to establish liability.

Where, as here, a plaintiff cannot prove all elements of liability on a classwide basis with classwide proof, then common issues cannot "predominate" in the claim *as a whole*. *See, e.g.*, *Newton*, 259 F.3d at 172 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."); *see also Vega*, 564 F.3d at 1274; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 326-27 (5th Cir. 2008); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393-94 (5th Cir. 2007); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Gariety v.*

Grant Thornton, LLP, 368 F.3d 356, 362-63 (4th Cir. 2004); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996). In all of these cases, in sharp contrast to this case, the plaintiffs' allegation that the defendant engaged in a common course of wrongdoing was insufficient as a matter of law to warrant certification limited to that discrete issue in light of the individualized nature of other elements of liability.

Indeed, allowing "issue" classes under Rule 23(b)(3), like the one certified below, would undermine the efficiency concerns that animate the Rule in the first place. If subsequent individual proceedings are necessary to establish liability, the utility of a class action is sharply limited. *See, e.g.*, *Allison*, 151 F.3d at 419-20; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 & n.12 (11th Cir. 1997). Certification of an "issue" class to litigate only discrete elements of plaintiffs' claims does not *prevent* individual proceedings, but *guarantees* them.

Trying different elements of liability before different juries, moreover, raises serious Seventh Amendment problems. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States."). Because the various elements of a cause of action often turn on the same facts, a jury addressing one discrete element of liability may find facts differently than another jury addressing another discrete element of liability, in violation of that constitutional command. *See, e.g.*, *Allison*, 151 F.3d at 423-24 & n.21; *Castano*, 84 F.3d at 750-51 & n.30; *see*

generally Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318-19 (5th Cir. 1978).

This case underscores the point. A jury addressing causation in an individual proceeding would necessarily have to understand the alleged design defect to decide whether it caused the failure of a particular window, and therefore may re-examine facts relating to defect that were already tried to a class jury. A case involving comparative fault would present this problem even more starkly. It is common for plaintiffs to blame multiple parties (*e.g.*, manufacturers, builders, and contractors) for window failure. In comparative-fault jurisdictions, a jury would be required to assess the comparative fault of all responsible parties, which in turn would require the jury to re-examine the facts relating to defect that were already tried to a class jury, in violation of the Seventh Amendment.[3]

The Seventh Circuit's assertion that Rule 23(b)(3) gives a district court "the discretion to split a case by certifying a class for some issues, but not others," App. 7a, exacerbates a festering circuit conflict on the propriety of "issue" classes. Like the Seventh

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[3] Both the district court and the Seventh Circuit dismissed the Seventh Amendment problem on the ground that the class jury would determine "liability," while an individual jury would determine "damages." App. 9-10a, 83a. Causation, however, is an element of liability, not damages. Regardless of whether it is generally permissible under the Seventh Amendment to "split" a case between liability and damages, *but see Blue Bird*, 573 F.2d at 318-19, the lower courts here impermissibly "split" this case between discrete elements of liability.

Circuit, the Second and Ninth Circuits have held that district courts may certify "issue" classes to adjudicate particular *elements* of claims, even if individualized issues preclude classwide adjudication of those claims *as a whole*. *See, e.g.*, *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (holding that class certification warranted to address defendant's conduct, regardless of individualized defenses); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Rule 23 authorizes the district court in appropriate cases to isolate the common issues ... and proceed with class treatment of these particular issues."); *cf. Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007) (noting that, in light of *Strip Search*, a district court could certify a class "to litigate the first element of [an] antitrust claim—the existence of a Sherman Act violation," regardless of whether other elements of such a claim are individualized); *Brown v. Kelly*, 609 F.3d 467, 483-85 (2d Cir. 2010) (same). These other circuits buttress their interpretation with Rule 23(c)(4), which authorizes certification "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). *See Strip Search*, 461 F.3d at 227; *Valentino*, 97 F.3d at 1234.

As the Fifth Circuit has explained, however, Rule 23(c)(4) cannot reasonably be read to "eviscerate" the predominance requirement of Rule 23(b)(3) by allowing the certification of "issue" classes where, as here, common issues do not predominate in a claim *as a whole*. *Castano*, 84 F.3d at 745 n.21; *see also Steering Committee*, 461 F.3d at 601; *Allison*, 151 F.3d at 421-22. Rather, Rule 23(c)(4) "is a housekeeping rule that allows courts to sever the

common issues for a classwide trial" if and only if the undiluted predominance requirement of Rule 23(b)(3) is satisfied. *Castano*, 84 F.3d at 745 n.21.

The upshot is that this case highlights a circuit conflict on the propriety of certifying "issue" classes to resolve discrete elements of claims on a classwide basis where (as here) other elements of those claims concededly require individualized adjudication. *See, e.g.*, *Strip Search*, 461 F.3d at 226-27 (expressly disagreeing with the Fifth Circuit's ruling in *Castano* that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009) (noting that this issue "has generated divergent interpretations among the courts"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (same). Given the ubiquitous role of class actions in our contemporary legal culture, the propriety of certifying discrete "issue" classes under Rule 23(b)(3) warrants this Court's review.

II. A Court May Not Certify An "Issue" Class Under Rule 23(b)(2) To Adjudicate Discrete Issues That Will Not Result In Final Declaratory Relief.

The Seventh Circuit next erred, and created a conflict among the circuits, by holding that it was appropriate for the district court to certify a non-opt-out class under Rule 23(b)(2), even though that class cannot obtain final declaratory (or other) relief. Under the plain language of that provision, non-opt-out certification is warranted where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final* injunctive relief or *corresponding* declaratory

relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). "Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(2); *see also* Charles A. Wright *et al.*, *Federal Practice & Procedure* § 1775 (3d ed. 2005) (to be "corresponding," "the declaration should be equivalent to an injunction"). Thus, whether a plaintiff seeks injunctive or declaratory relief, certification under Rule 23(b)(2) is warranted only where the plaintiff seeks *final* relief.

The district court nonetheless certified a non-opt-out class seeking declaratory relief under Rule 23(b)(2) while acknowledging that the class could not obtain—and indeed did not seek—any final relief. As the court pointed out, the various Declarations sought by respondents, *see supra* n.2, "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a. In other words, a declaration regarding a "defect" would not establish liability for any particular claim, and individual proceedings would still be necessary for any class member to obtain any final relief—whether injunctive or monetary in nature. The Seventh Circuit endorsed the district court's analysis, expressly rejecting Pella's argument that "the class does not seek *final* injunctive relief as the rule requires." App. 8a (emphasis in original). It suffices, the Seventh Circuit held, that class members would benefit from certain declarations

regarding discrete elements of their claims. *See* App. 8-9a.[4]

That holding cannot be squared with Rule 23(b)(2) or cases from other circuits applying that provision. The point here is essentially the same as the point made above with respect to Rule 23(b)(3): a class action is not an appropriate device for adjudicating discrete legal issues that will then require individual adjudication by each class member to establish liability or obtain any relief. Rule 23(b)(3) makes the point through its "predominance" requirement; Rule 23(b)(2) makes the point through its "final" relief requirement. Where, as here, common issues do not "predominate" so that class certification is inappropriate under Rule 23(b)(3), plaintiffs cannot simply turn to Rule 23(b)(2) to pursue similarly non-final declaratory relief regarding one or more discrete elements of their claims.

Given the plain language of Rule 23(b)(2), it is hardly surprising that the First, Fifth, and Eleventh

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[4] The Seventh Circuit also suggested that "the cumulative effect" of the Declarations for class members "will be an entitlement to have their windows replaced." App. 9a. As the district court recognized, that suggestion is incorrect, because the Declarations do not purport to resolve individual liability issues, including the bedrock issue of causation. App. 73a. Indeed, as the district court pointed out, plaintiffs themselves disavowed any suggestion that the Declarations would resolve causation in individual cases. *See id.* Thus, even if the Declarations were granted, each class member would still have to prove that any moisture-related damage was caused by the declared defect, as opposed to some other factor like improper window installation.

Circuits have expressly rejected the certification of "issue" classes seeking non-final declaratory relief under Rule 23(b)(2). *See Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 & n.11 (11th Cir. 2008); *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 426-27 (1st Cir. 2007); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344-45 (11th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977-79 & n.39 (5th Cir. 2000). In those cases, as here, the requested declaratory relief would not resolve any class member's claim—rather, each class member still would need to initiate follow-on proceedings to adjudicate individualized liability issues. This, of course, would undermine the very "judicial economy and efficiency" that are "[a]mong the primary rationales behind the class action mechanism." *McKenna*, 475 F.3d at 427. A Rule 23(b)(2) class, in other words, cannot serve merely as a stepping-stone to subsequent individual proceedings, but must resolve the parties' rights. *See, e.g., id.* at 422 (rejecting certification of class "aimed at clearing the way for [individual] rescission claims").

It is hard to overstate the practical implications of the Seventh Circuit's cavalier approach toward certification of "issue" classes for non-final declaratory relief under Rule 23(b)(2). As this case shows, a plaintiff can virtually always allege a common course of wrongdoing. If such an allegation alone were sufficient to warrant certification of a non-opt-out class seeking declaratory relief with respect to that single issue, then such declaratory "issue" classes could be certified in virtually every case. The fact that Rule 23(b)(2), in sharp contrast to Rule 23(b)(3), does not require the court to provide

absent class members with either notice or an opportunity to opt out of the class only heightens the problem. The decision below opens the door for classwide declaratory adjudication of discrete elements of potential individual claims for money damages without any notice to absent class members. Neither the Rule nor due process tolerates that result.

III. A Court May Not Certify A Nationwide Class Under Rule 23(b)(2) To Pursue State-Law Claims Without Analyzing The Underlying State Laws To Determine That They Are Consistent.

Finally, the Seventh Circuit erred, and strayed from the well-worn path followed by other circuits, by affirming the district court's certification of a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent. Under that provision, class certification is warranted only where final injunctive or declaratory relief is warranted for "the class as a whole." Fed. R. Civ. P. 23(b)(2). Needless to say, a court cannot determine whether relief is warranted for a nationwide class "as a whole," *id.*, without analyzing each of the laws alleged to provide the basis for such relief to determine that they provide a consistent basis for classwide relief.

The district court, however, engaged in no such analysis before certifying the nationwide Rule 23(b)(2) class in this case. Indeed, the court's cursory analysis of the Rule 23(b)(2) class addresses only the Rule's first requirement—"the party opposing the class has acted ... on grounds that apply generally to

the class"—and does not address the Rule's second requirement that "the class as a whole" must be entitled to final injunctive or declaratory relief. *See* App. 71-73a. Pella's Rule 23(f) petition challenged the district court's failure to analyze differences in state law before certifying a nationwide class, *see* App. 35-37a, but the Seventh Circuit appears to have dismissed that point as no more than a "minor concern[] that relate[s] primarily to the manageability of the class." App. 10a.

That dismissive approach conflicts with numerous decisions recognizing that certification of a nationwide class to pursue state-law claims is *per se* unwarranted without a careful analysis of the relevant laws of the fifty States to determine whether the claims can be proved on a classwide basis. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001); *Andrews*, 95 F.3d at 1024; *Castano*, 84 F.3d at 741-44; *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011-12, 1016-17 (D.C. Cir. 1986) (R.B. Ginsburg & Edwards, JJ.); *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986). Differences in state law are not a matter that can be swept under the rug; rather, as then-Judge R.B. Ginsburg, joined by Judge Edwards, explained, "nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Walsh*, 807 F.2d at 1017 (internal quotation omitted). The decision below affirming certification of a nationwide class to pursue state-law claims without *any* analysis of the relevant laws of the fifty States cannot be squared with these precedents.

Nor does the federal Declaratory Judgment Act, 28 U.S.C. § 2201, allow courts to sidestep the requisite analysis of state law. As this Court has long explained, that Act is "procedural only," insofar as it creates a mechanism for declaring rights under substantive law but does not create any such rights. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Thus, the Act "does not create a basis for class certification under Rule 23(b)(2) if none exists" under the relevant substantive law. *Christ*, 547 F.3d at 1298; *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 729 (9th Cir. 2007); *Bolin*, 231 F.3d at 978-79; *cf. Walsh*, 807 F.2d at 1011-12, 1016-17 (vacating certification of nationwide class under federal Magnuson-Moss Act, 15 U.S.C. § 2301 *et seq.*, which in turn incorporates state law). Under no circumstances does the Declaratory Judgment Act relieve a court of its obligation to analyze differences in state law before certifying a nationwide class to pursue state-law claims.

The Seventh Circuit's affirmance of the Rule 23(b)(2) class without any consideration of respondents' underlying claims is particularly egregious because many jurisdictions have specifically refused to recognize "no injury" claims. As noted above, this class includes persons who own "windows that have not manifested the alleged defect." App. 51a, 83-84a. Because many (if not most) States do not recognize "no-injury" claims (*i.e.*, claims regarding products that "have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it," *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.4 (5th Cir. 2001)) there is certainly no basis to assume that uninjured owners

of ProLine casement windows in all fifty States have a common claim for which they may seek declaratory relief. *See, e.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503-05 (8th Cir. 2009); *Cole v. General Motors Corp.*, 484 F.3d 717, 729-30 (5th Cir. 2007); *Briehl v. General Motors Corp.*, 172 F.3d 623, 627-28 (8th Cir. 1999); *Ford Motor Co. v. Rice*, 726 So.2d 626, 627-31 (Ala. 1998). Needless to say, the Declaratory Judgment Act does not authorize declaratory relief in the absence of an underlying claim. *See, e.g.*, *Aetna Life*, 300 U.S. at 240-41. The Seventh Circuit has thus blessed a Frankenstein nationwide declaratory-judgment class of non-injured plaintiffs to pursue claims that may or may not even exist under the laws of any particular State.

The bottom line is that certification of a nationwide class action is an extraordinary step, and district courts may not take that step without carefully analyzing the laws of the fifty States for consistency. Here, there is no question that the laws of the fifty States differ with respect to respondents' claims. Indeed, the district court itself acknowledged those differences by certifying six state-specific damages subclasses under Rule 23(b)(3), App. 51a, 74-78a & n.12, 84a, and refusing to certify a seventh such subclass under North Carolina law, App. 62a n.7. *A fortiori*, that means that respondents cannot prove that final injunctive or declaratory relief is warranted for a nationwide class "as a whole." Fed. R. Civ. P. 23(b)(2). This Court should bring the Seventh Circuit back into line, lest that circuit become a magnet for nationwide "issue" class actions that could not be certified elsewhere. The Seventh Circuit's enthusiasm for "imaginative solutions" under Rule 23, App. 10a (internal quotation omitted),

must be tempered by this Court's admonition that "the text of [the] rule ... limits judicial inventiveness." *Amchem*, 521 U.S. at 620.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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September 13, 2010

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 09-8025

PELLA CORPORATION AND PELLA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition for Leave to Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:06-cv-04481—**James B. Zagel**, *Judge.*

SUBMITTED MARCH 12, 2010—
DECIDED MAY 20, 2010

Before POSNER, WILLIAMS and TINDER,
Circuit Judges.

PER CURIAM. Pella Corporation manufactures windows for homes and sells them through its subsidiary, Pella Windows and Doors, Inc. (collectively "Pella"). Over the last 18 years, Pella has sold more than six million aluminum-clad wood "ProLine" casement windows nationwide. Plaintiffs, owners of structures containing the windows in question, allege that the windows contain a design defect that permits water to seep behind the

aluminum cladding and causes the wood to rot at an accelerated rate. In response to the number of windows needing replacement, Pella created the "Pella ProLine Customer Service Enhancement Program" to compensate affected customers. According to Plaintiffs, Pella attempted to modify its warranty through the program but never informed the end consumers of the program's existence or of the defect. Plaintiffs brought suit against Pella, alleging that it committed consumer fraud by not publicly declaring the role that the purported design defect plays in allowing rot. After the district court certified two classes of plaintiffs, Pella sought permission to appeal the certification pursuant to Federal Rule of Civil Procedure 23(f). We grant Pella's Rule 23(f) petition for permission to appeal and affirm the district court's decision certifying the classes.

1. BACKGROUND

The district court certified two classes of consumers in this action. First, it certified a nationwide class under Federal Rule of Civil Procedure 23(b)(2), consisting of all class members who own structures containing Pella ProLine aluminum-clad casement windows manufactured from 1991 to the present, whose windows have not yet manifested the alleged defect or whose windows have some wood rot but have not yet been replaced. The district court found the class met the criteria of Rule 23(b)(2) because Pella "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). If successful,

these class members would be entitled to six declarations that together essentially declare that all ProLine windows have a defect which results in premature rotting and this defect requires disclosure; that Pella modified its warranty without notice by creating the enhancement program; that Pella must notify owners of the defect; that the ten-year limitation in the original warranty is removed; that Pella will reassess all prior warranty claims related to wood rot; and that Pella, upon a class member's request, will pay the cost of inspection to determine whether the wood rot is manifest, with any coverage disputes adjudicated by a Special Master. This class adjudication process would be followed by an individual claims process in which class members may file a claim with Pella for service "[i]f and when their windows manifest wood rot due to the alleged defect." The district court explained that absent class members also may bring individual suits for money damages.

The second group of certified classes is much narrower and consists of only those who have had a manifest defect and whose windows already have been replaced. The court certified six statewide liability classes under Federal Rule of Civil Procedure 23(b)(3) in California, Florida, Illinois, Michigan, New Jersey, and New York, on the theory that Pella violated state consumer fraud laws by failing to disclose the defect. Certification under Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R.

Civ. P. 23(b)(3). The district court explicitly declined to certify issues related to causation, damages, and statute of limitations.

Pella seeks interlocutory review of these class certifications pursuant to Federal Rule of Civil Procedure 23(f), arguing, *inter alia*, that consumer fraud cases as a general matter are not amenable to class treatment, due to problems with causation, reliance, and calculating damages. We grant the petition in order to address the contention that consumer fraud claims are inappropriate for class treatment. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (acceptance of an appeal is appropriate to "facilitate the development of the law" governing class actions). The parties' arguments are clearly set forth in Pella's Rule 23(f) petition and respondents' opposition, and no further briefing or argument is necessary. We affirm the district court's certification of the two classes.

II. ANALYSIS

While consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified. Pella relies on various decisions from this circuit reversing the grant of class certification in consumer fraud actions to draw the broad conclusion that consumer fraud cases are inappropriate for class treatment as a general matter. But those cases did not opine that class certification was *never* appropriate in consumer fraud cases, only that it was inappropriate in the circumstances before it. *See, e.g., Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (no common issues of law because there did not

appear to be a single understanding of the significance of labeling or advertising of the allegedly deceptive statements); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (class certification inappropriate because the proposed class representative's claims were not typical of putative class); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (tire-defect class action unmanageable given numerous different designs of allegedly defective tires and varying recalls).

In *Thorogood*, the court noted that there are times when class certification is "a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs." 547 F.3d at 748. We reassert that proposition here and hold that the district court properly weighed the facts before it and exercised its discretion to conclude that the common predominant issue of whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment. The district court reasonably determined that the individual issues that necessarily arise in a consumer fraud action would not prevent class treatment of the narrow liability issues here.

Class treatment of consumer fraud cases can certainly present difficulties, and courts should consider these concerns before deciding to grant class certification, as the district court did below. One concern is the risk of error in having complex issues that have enormous consequences decided by one trier of fact rather than letting a consensus emerge

from multiple trials. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003); *see also Thorogood*, 547 F.3d at 745. This is not a case where the issues are so complex, and Pella does not claim that the consequences are so high, that a decentralized process of multiple trials is necessary for an accurate evaluation of the claims. The district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty.

In contrast to *Thorogood* where there were no common issues of law or fact and the court questioned whether anyone besides the plaintiff shared the same concerns with the product, here there is an economy to class treatment of the question whether the ProLine windows suffer from a basic design defect, the resolution of which has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs. *See Thorogood*, 547 F.3d at 748. According to class counsel, they already have been contacted by over 350 consumers who have experienced the same wood rot problems set forth in the complaint. Where there are common issues and the accuracy of the resolution of those issues "is unlikely to be enhanced by repeated proceedings, then it makes good sense,

especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." *Mejdrech*, 319 F.3d at 911.

Another concern in consumer fraud cases is the issue of proximate causation. Pella argues that too many individual variances between class members exist, because wood can rot for many reasons other than window design and is affected by specific conditions such as improper installation. Proximate cause, however, is necessarily an individual issue and the need for individual proof alone does not necessarily preclude class certification. 5 William B. Rubenstein, Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 17.28, pp. 413-14 (4th ed. 2002). A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments. *See, e.g., Arreola v. Godinez*, 546 F.3d 788, 799800 (7th Cir. 2008); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Under the district court's plan, class members still must prove individual issues of causation and damages. While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown, or the facts bearing on their claims may be unknown, this possibility does not preclude class certification. *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009), *citing* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 2:4, pp. 73-75 (4th ed. 2002). The narrow way in which the district court defined the classes here

eliminates concern that the definitions are overbroad or include a great many people who have suffered no injury.

Pella also argues that certification under Rule 23(b)(2) was inappropriate because this is really a case about money, and the class does not seek *final* injunctive relief as the rule requires, but only as a stop on the way to damages which individuals must then pursue. Rather than simplifying the litigation, Pella objects that the proposed declarations considered by the district court as injunctive relief are really illusory and will multiply, and even require, individual litigation. However, Pella mischaracterizes the effect of the six declarations contemplated by the district court. It is not necessarily the case that individual litigation would be required. The court split the purchasers of windows into two groups: those who have replaced their windows, and those who have not. Those who have replaced their windows are properly members of the (b)(3) class because they require the award of damages to make them whole. Those who have not replaced their windows but might in the future because of the purported design flaw are properly members of a (b)(2) class. Such purchasers would want declarations that there is an inherent design flaw, that the warranty extends to them and specific performance of the warranty to replace the windows when they manifest the defect, or final equitable relief. *Cf. Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) (suggesting class treatment of the equitable relief to be followed by individual damage proceedings where the equitable relief sought is the same for all class members).

If the district court finds in favor of the class and enters all six declarations, the cumulative effect will be an entitlement to have their windows replaced, and the (b)(2) class will benefit uniformly from the declarations. The contemplated process in which members may file a claim with Pella for service does not appear to be any different than the process by which an owner would file a claim with Pella under a warranty. Having to adjudicate coverage issues with a Special Master is necessary only if there is a dispute; it would not be required for every class member as Pella suggests. Moreover, the district court specifically provided that "[t]here is no side-by-side recovery here." It explained that class members whose defect has not yet manifested are not included in the damages class; only once the windows experience any manifest defect, if ever, will the class members be able to submit a claim to Pella for repair.

Finally, Pella suggests that the manner in which the district court proposes to proceed will violate its Seventh Amendment rights because facts found by the class jury would necessarily be reviewed by the individual juries. Pella argues that the first jury must decide how much the design of the windows, as opposed to other factors, contributed to rot and that the individual juries must then consider the same issue later, but proximate cause is an individual issue and will not be addressed by the class jury. The class jury will be asked to decide only if there was an inherent design defect present in the windows when they left the factory, whether Pella had a duty to disclose the defect, and whether Pella attempted to modify its warranty. Issues of causation and damages issues, such as whether that

defect caused the damage to a particular window and how much the design contributed to the rot, will be handled individually. "Thus a class proceeding for equitable relief vindicates the seventh amendment as fully as do individual trials, is no more complex than individual trials, yet produces benefits compared with the one-person-at-a-time paradigm." *Allen*, 358 F.3d at 472.

Pella raises other minor concerns that relate primarily to the manageability of the class, but none of these demonstrate that the district court abused its discretion. Under Rule 23, district courts are permitted to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Carnegie*, 376 F.3d at 661; *see also Lemon* v. *Int'l Union of Oper. Engineers*, 216 F.3d 577, 582 (7th Cir. 2000). In making the decision to certify the classes, the district judge had before him hundreds of pages of legal briefing, as well as hundreds of pages of documents, deposition transcripts, and expert reports. Plaintiffs point out that they submitted a sample trial plan with a comparative legal analysis of each subclass state, suggestions of how the case could be tried in phases, and a statement of class structure and remedies. Even the certification of the six state subclasses demonstrates that the district court carefully considered how the case would proceed, explicitly finding that the consumer protection acts of these six states have nearly identical elements and declining to certify a seventh state subclass that would have required a subjective analysis.

III. CONCLUSION

The district court's decision to certify the two classes in this case did not contradict circuit precedent. While consumer fraud class actions present challenges that a district court must carefully consider, there are circumstances where certification is appropriate. We conclude that this case is one of those circumstances. We GRANT Pella's Rule 23(f) petition for permission to appeal and AFFIRM the decision of the district court certifying the classes.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 14, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No. 09-8025

PELLA CORPORATION AND PELLA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT, EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition for Leave to Appeal from the United States District Court for the Northern District of Illinois, Easter Division.

No. 1:06-cv-4481

James B. Zagel, *Judge.*

O R D E R

On consideration of the petition for panel rehearing or rehearing en banc filed by Respondents on June 3, 2010, all members of the original panel have voted to deny the petition for rehearing. No

judge in regular active service requested a vote on the request for rehearing en banc.* Accordingly, the petition is DENIED.

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* Circuit Judge Flaum did not participate in the consideration of the petition for rehearing en banc.

June 26, 2010

No. 09-_____

United States Court of Appeals for the
Seventh Circuit

Dr. Leonard E. Saltzman, Kent Eubank, Thomas Riva, William and Nancy Ehorn, individually and on behalf of all other similarly situated,
Plaintiffs-Respondents,

vs.

Pella Corporation, an Iowa corporation, and Pella Windows and Doors, Inc., a Delaware corporation,
Defendants-Petitioners.

On Appeal From The United States District Court
For The Northern District Of Illinois
Case No. 1:06-cv-04481
The Honorable James B. Zagel

DEFENDANTS' PETITION FOR LEAVE TO APPEAL CLASS CERTIFICATION ORDER UNDER FED. R. CIV. P. 23(f)

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STATEMENT OF JURISDICTION

The District Court has jurisdiction of these putative class actions under 28 U.S.C. § 1332(d). The matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, because plaintiffs claim replacement costs and other damages allegedly caused by approximately six million windows. 28 U.S.C. § 1332(d)(2). At least one member of the putative class is also a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). The named plaintiffs are Leonard Saltzman, a citizen of Illinois; Thomas Riva, a citizen of Florida; Lubo and Maria Hadjipetkov, citizens of New Jersey; and William and Nancy Ehorn, citizens of California. Dkt. 20, ¶¶ 4-6. Defendant Pella Corporation is incorporated in Iowa and its principal place of business is in Iowa. Dkt. 20, ¶ 7. Defendant Pella Windows & Doors, Inc., is incorporated in Delaware and its principal place of business is in Illinois. Dkt. 20, ¶ 8; Dkt. 56 ¶ 8.

The Court of Appeals has jurisdiction to entertain this Petition under Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a). This Petition is timely, because it is filed within 10 days after the District Court entered its class certification order on June 12, 2009, calculated under Fed. R. Civ. P. 6. (The District Court signed the order on June 4, 2009, but the order was not entered on the court's docket until June 12, 2009, and "the crucial date for determining timeliness is the date the order was entered on the district court's docket sheet, not the date it was signed." *In re ANR-Advance Transp. Co.*, 73 Fed. Appx. 183, 185 (7th Cir. 2003); *see also Adono v.*

Wellhausen Landscape Co., 258 Fed. Appx. 12 (7th Cir. 2007) (same).)

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QUESTIONS PRESENTED

1. May courts create a mandatory Rule 23(b)(2) class by severing the damages claims of consumer fraud plaintiffs for individual litigation and certifying a novel theory of relief, unfounded in any substantive law, that would have the court rewrite private warranties?

2. May a nationwide Rule 23(b)(2) class be certified on the theory that the federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides a uniform national cause of action, eliminating differences in state law?

3. May Rule 23(b)(3) issue classes be certified to litigate small parts of claims when the claims as a whole are predominated by individual issues and dividing the claims will multiply litigation and violate the Seventh Amendment?

INTRODUCTION

In the last 18 years, Pella has sold approximately six million wood ProLine casement windows nationwide. Plaintiffs contend that each of them was sold through consumer fraud because Pella did not publicly declare that they have an alleged design defect that, plaintiffs say, makes the wood more susceptible to rot. This Court has repeatedly held that consumer fraud claims such as these cannot be litigated as class actions because they contain predominantly individual issues. The district court conceded that plaintiffs' claims cannot be tried to judgment as a class because several issues, including "causation" are "too individualized" for class certification. Memorandum Opinion and Order (attached as addendum hereto [hereinafter "Add."])

12. But instead of denying class certification, the district court rewrote Rule 23 to certify a nationwide Rule 23(b)(2) class and six statewide classes under Rule 23(b)(3) to litigate small pieces of plaintiffs' claims on the theory that, "because I decline to certify a class on the issue of causation and damages," the individuality of those issues "is not an obstacle to certification on issues of liability." Add. 14. The district court's "issue" classes will not produce final judgments and will not eliminate individual litigation. Individual trials for each class member will follow the Rule 23(b)(3) class, and members of the Rule 23(b)(2) class, according to the district court, may bring their own, separate suits for damages.

For several reasons, this Court should grant review of the district court's certification order under Rule 23(f). First, "[a]ccepting an appeal in a big-stakes case is especially appropriate when the district court's decision is problematic, as it is here." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). The class certification order flies in the face of this Court's precedent. That alone is sufficient reason to review it. Second, an important function of Rule 23(f) "is permitting appellate review of important legal issues that otherwise might prove elusive." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). The district court's certification order raises three novel and important issues about the limits of Rule 23 set forth at the beginning of this petition. These issues are important not just to this case, but to the development of class action law generally.

Finally, this interlocutory appeal will likely be the Court's only chance to review the district court's order. Only this first decision of the district court on class certification can be reviewed under Rule 23(f), *Asher v. Baxter Int'l Inc.*, 505 F.3d 736 (7th Cir. 2007), and the Court cannot anticipate having the opportunity to review the decision after final judgment. The district court's certified classes will not produce a final judgment, only rulings leading to individual litigation. Moreover, this litigation will be so unmanageable, and the well-documented "pressure on the defendant to settle regardless of the actual merit of the suit" so extreme, that there may never be a final judgment. *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001). Granting review now to protect Pella against the coercive effect of the district court's order falls squarely within the purpose of Rule 23(f). *See In re Bridgestone*, 288 F.3d at 1015-16; *Thorogood v. Sears*, 547 F.3d 742, 745-46 (7th Cir. 2008).

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' claims. The named plaintiffs in this case[1] seek to litigate a novel consumer fraud claim on behalf of owners and former owners of every aluminum-clad wood casement window sold by Pella under its ProLine brand over the last 18 years—approximately six million windows nationwide. Dkt. 114, p. 4. Because ProLine windows are made with wood, they are susceptible, as all outdoor wood

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[1] Although the caption lists five individual plaintiffs, only two of them, Dr. Leonard E. Saltzman and Thomas Riva, are offered as potential class representatives of the certified classes.

products are, to rot. To prevent rot, Pella treats its wood with preservatives and protects the wood with design elements in the windows. Dkt. 117-1, Jablonski Dep. 72, 168, 178. These efforts largely succeed. After ten years in service, only 3.464% of windows of the vintage owned by named plaintiff Leonard Saltzman have had claims that are potentially related to wood rot. Dkt. 130, ¶¶ 3-4. Owners of this small percentage of windows can seek relief under Pella's 10-year limited warranty. Dkt. 20-1. Pella also provides extra-warranty service through the ProLine Customer Service Enhancement, which reimburses distributors for the labor costs of replacing windows within the warranty period and partially subsidizes the cost of replacement windows for five years after the warranty expires. Dkt. 115-3.

Plaintiffs nonetheless argue that Pella committed consumer fraud on the following novel theory: the ProLine casement windows' design allows water behind the aluminum cladding; this design makes all windows susceptible to rot, causes some windows to rot sooner than they should, and is therefore defective; and Pella committed consumer fraud by not publicly declaring the role defective design allegedly plays in allowing rot. Pella, of course, disagrees, but this petition is not the forum for settling those merits disputes.

B. The classes plaintiffs sought to certify. In the district court, plaintiffs sought in relevant part to certify two classes. First, plaintiffs sought a nationwide declaratory judgment class formed of "[a]ll persons in the United States who own structures containing Pella ProLine aluminum clad

casement windows manufactured from 1991 to present," Add. 2 n.3—premised solely on the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Add. 2 n.3. Second, they sought a single Rule 23(b)(3) consumer fraud class of all persons in the states of Illinois, California, Florida, Michigan, New Jersey, New York, and North Carolina who purchased a ProLine casement window and/or own a structure containing such a window from January 1, 1991 to present. This class was premised on the consumer fraud laws of the named states.

C. The district court's plan for certifying certain issues for class litigation, to be followed by individual suits. The district court, recognizing that this Court repeatedly has reversed certifications of consumer fraud classes, *see infra* at 9, agreed that plaintiffs' claims could not be litigated to judgment as a class action because several individual issues will require separate litigation for each putative class member, among them:

Causation—"I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue." Add. 28 n.13.

Injury and damages—"[T]he inquiry with regard to damages ... is too individualized." Add. 12. The diminished value caused by the potential for wood rot "is simply too difficult to quantify, especially on a class-wide basis. ... This determination is too difficult to standardize fairly, and individualized issues would certainly dominate." Add. 29.

Whether a claim is time barred—"Accrual and tolling vary by state and therefore an individual determination is required." Add. 26.

The court nonetheless decided to certify classes to litigate certain issues, to be followed by separate suits for each class member litigating the individual issues.

1. The nationwide Rule 23(b)(2) declaratory judgment class. First, the district certified a single, nationwide class under Rule 23(b)(2) "for all class members whose windows have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced." Add. 5.[2] The district court's order does not identify the "members" of this class. But plaintiffs asked for a class of "[a]ll persons in the United States who own structures containing Pella ProLine aluminum clad casement windows manufactured from 1991 to present." Add. 2 n.3. That is presumably what the district court certified.

The district court also does not identify what substantive law will govern the claims of the members of the nationwide class. Plaintiffs argued that that the Declaratory Judgment Act provides a national rule of decision. Dkt. 144, p. 3. ("The claim supporting this class is a federal statute, 28 U.S.C. § 2201, with standard applicability and elements nationwide."). Presumably, that is what the district

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[2] On plaintiffs' motion to clarify, the district court made it clear that this class includes *both* persons whose windows have not rotted *and* persons whose windows have rotted. Dkt. 164.

court concluded because it did not identify any other law.

Uncabined by the elements of any substantive law, the district court certified the Rule 23(b)(2) class to determine whether the court should rewrite Pella's warranty to make it apply in perpetuity and create a new window inspection and replacement program. Add. 2-3 n.3. Specifically, the court certified the class to litigate plaintiffs' entitlement to six declarations:

Declaration I: all ProLine windows have a defect that "result[s] in premature rotting" of the window, and this defect "requires disclosure to all of these windows";

Declaration II: the Proline Customer Service Enhancement initiated in 2006, which provides extra-warranty service for ProLine casement windows, "is a modification of Pella's warranty requiring disclosure";

Declaration III: "all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella";

Declaration IV: "Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation."

Declaration V: "The Court declares that Pella shall re-audit and reassess all prior warranty claims ... of claims related to ProLine window wood rot."

Declaration VI: "The Court declares that Pella shall establish an inspection program and protocol to be communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a Special Master appointed by the Court and/or agreed to by the parties."

Add. 2-3 n.3.

The identities of the putative class members are largely unknown. Pella sells windows mostly to independent distributors; national accounts such as Lowe's, Menard's and lumberyards; and large builders such as Morton Factory Homes. Dkt. 149-8, ¶¶ 3, 6-8. It often does not know the identities of the ultimate homeowners. In addition, over an 18-year period, ownership has changed for many of the houses, in some cases several times. To identify the class members, the district court indicated it would order notice by "publication, television and news media, and the Internet" and invite people to submit photographic proof that they own Pella ProLine casement windows. Add. 6. The court acknowledged that sometimes "claim supplementation may be required" to identify class members, involving in-person inspections of the class members' homes. Add. 6, 7 n.4. It did not specify who will oversee this process, or whether Pella will be entitled to dispute class membership, or whether only people who submit claims will be included in the class. The court stated only that "Defendants' concern that individual inquiry would be required to verify that particular class members have the windows in question is easily assuaged." Add. 6; *but see Simer v.*

Rios, 661 F.2d 655, 669 (7th Cir. 1981) (holding that courts must consider the burdens "that such a process might entail" in order to "decide whether the class device simply would be an inefficient way of trying the lawsuit for the parties as well as for its own congested docket").

The district court intends the class adjudication to be followed by an individual claims process. "If and when their windows manifest wood rot due to the alleged defect, they may file a claim with Pella for service." Add. 22. In addition, members of the Rule 23(b)(2) class may bring individual suits for damages independent of the class action. "Since they will not be afforded an opportunity to opt out of the 23(b)(2) class, the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata." *Id.*

2. The six statewide Rule 23(b)(3) issue classes. For persons who have replaced a Pella ProLine casement window because of wood rot (whether caused by the alleged design defect or something else), the district court certified:

> a Rule 23(b)(3) statutory consumer fraud class, consisting of the follow six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows.

Add. 5. The order does not identify the "members" of this class. Plaintiffs asked for a class of "[a]ll persons in the [listed states] who purchased a Pella ProLine aluminum clad casement window/s and/or own a structure containing a Pella ProLine aluminum clad case [sic] window, between January

1, 1991 and present (date of certification)." Add. 2 n.1. That is presumably what the district court ordered.

The district court acknowledged that identifying the members of the damages classes will pose severe problems because the classes, by definition, include only those persons who already have replaced their Pella ProLine windows. Regarding the management of the identification process, the district court said only that "it is possible that they have records of a Pella inspection or have taken photographs of the window that might assist in proving their class membership." Add. 10.

Five of the six statewide Rule 23(b)(3) classes have no named plaintiff. Of the named plaintiffs, Saltzman alone lives in one of the listed states (Illinois) and has replaced a Pella ProLine window because of rot. No named plaintiff exists for the Florida, Michigan, New York, California, or New Jersey damages classes. The district court brushed this issue aside, commenting that "courts have permitted named plaintiffs to represent class members from other states." Add. 15.

The district court acknowledged that "the inquiry with regard to damages and causation is too individualized" to be conducted in a class action. Add. 12. The court declared, however, that "because I decline to certify a class on the issue of causation and damages," the individuality of those issues "is not an obstacle to certification on issues of liability." Add. 14. The court found that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) were both satisfied because "the predominant questions will be the scope

of Pella's warranty, the nature of the [ProLine Customer Service Enhancement] and whether it amended the warranty, whether and when ProLine Windows suffered from an inherent wood 'durability' defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the defect and the PSEP [sic]." Add. 23 (quoting a district court opinion for the proposition that "[a] finding of commonality will likely satisfy a finding of predominance"); *but see Amchem Prods. v. Windsor*, 521 U.S. 591, 623-624 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding."). The district court did not analyze how questions about Pella's warranty are relevant to the elements of plaintiffs' claims for consumer fraud. Nor did it address how it plans to manage the individual trials on causation, damages, and other individual issues that will take place after the class adjudication.

ARGUMENT

I. The district court's certification of plaintiffs' consumer fraud claims for class litigation is a clear abuse of discretion under this Court's precedent.

The consumer fraud claims raised in this case cannot be certified for class treatment under this Court's precedents because they are dominated by individual issues such as reliance, causation, injury, and damages.

This Court has repeatedly rejected class certification of consumer fraud claims. It did so in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), which addressed consumer fraud claims

targeting allegedly defective tires that were prone to blowouts. It did so again in *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), which addressed consumer fraud claims targeting Coca-Cola's failure to disclose the use of different sweeteners in fountain and bottled Diet Coke. It did so again in *Clark v. Experian Information Solutions, Inc.*, 256 Fed. Appx. 818 (7th Cir. 2007), which addressed consumer fraud claims targeting a website advertising free credit reports. And again, most recently, in *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742 (7th Cir. 2008), which addressed consumer fraud claims targeting the failure to disclose the fact that part of a dryer's stainless steel drum was in fact mild steel coated by ceramic.

The consumer fraud claims that plaintiffs raise present in extreme form all of the individual issues that have caused the Court to reject class certification. First, plaintiffs' claims raise even greater individual issues of causation than the issues that precluded certification in *Bridgestone*. In *Bridgestone*, the alleged harm was an increased risk of tire blowouts and the issue was whether the alleged design defect or something else caused any particular blowout. *Bridgestone*, 288 F.3d at 1019 (cataloguing factors that affect the failure rate of tires). Here, the alleged harm is an increased risk of wood rotting and the issue is whether the alleged design defect or something else caused a particular instance of rot. This issue cannot be answered without individual discovery and hearings as to each window, because wood can rot for any number of reasons unrelated to window design—damage during installation, improperly sized openings, structural shifting of the house, defects in surrounding siding,

and on and on. Even "Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration in and around the windows." Add. 12. The district court thus *agreed* "that issues of causation are too individualized for class certification." Add. 28 n.13.

The district court also agreed that the damages inquiry is "too individualized" for class treatment, Add. 12, just as it was in *Bridgestone* and *Thorogood*. As the district court explained in its opinion below, valuation

> is simply too difficult to quantify, especially on a class-wide basis. Windows are typically part of a larger structure, and many factors play a role in determining the valuation of that structure. Typically, individual pieces of the larger whole are not valued separately, but are rather one piece of the structure. This determination is too difficult to standardize fairly, and individualized issues would certainly dominate.

Add. 29[3]. These same issues afflicted the putative class in *Bridgestone* with respect to tires sold together with vehicles, *see* 288 F.3d at 1019 ("the resales may have reflected different discounts that could require vehicle-specific litigation"), and the putative class in *Thorogood* with respect to stainless steel drums sold only as part of clothes dryers, *see*

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[3] The district court made this comment in the context of denying certification of plaintiffs' unjust enrichment claim, but it applies equally to damages under the consumer fraud claims, as the district court recognized elsewhere in its order. Add. 12.

547 F.3d at 748 ("some ... may have incurred no damages at all because on the whole they prefer their stainless steel dryer to any other dryer they could buy"). Just so—even more so—with windows in houses.

Plaintiffs are suing for consumer fraud, so they must also prove reliance. The district court held that "[b]ecause this case involves a failure to disclose, reliance is presumed. No individualized inquiry is required." Add. 14. That is incorrect. Saltzman, the sole named plaintiff for the damages action, resides in Illinois, and in Illinois, "[i]n order to establish consumer fraud under a theory of concealment by silence, the plaintiff must allege and establish ... that the plaintiff actually relied on the defendant's deception, and that if the plaintiff had known of the facts concealed, she would not have purchased the product." *De Bouse v. Bayer AG*, 896 N.E.2d 882, 889 (Ill. App. Ct. 2008). This Court likewise has held that "our prior case law confirms that a claim under ICFA requires individualized proof." *Clark*, 256 Fed. Appx. at 821. Just as often, the Court has rejected class certification. *See ibid*; *Oshana*, 472 F.3d at 513-14 (all plaintiffs in Diet Coke sweetener case would be required to prove that they were "deceived in some manner and damaged by the deception"); *Thorogood*, 547 F.3d at 747 ("[e]ach class member ... will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum"). Proving reliance on the alleged omission here, where people *know* that wood can rot and where many people bought a house, not a separate window, will be a profoundly individualized task.

Still another individual issue is whether each class member's claim is time barred. This case seeks to reach back 18 years. The statutes of limitations are much shorter. As the district court acknowledged, "[a]ccrual and tolling vary by state and therefore an individual determination is required." Add. 26. *See, e.g., Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. 2008) ("[T]he predominance of individual issues necessary to decide an affirmative defense may preclude class certification" (internal quotation marks omitted)).

This Court has never affirmed the certification of claims raising so many individual issues.

II. The district court's decision to sever plaintiffs' damages claims for individual litigation and certify a mandatory Rule 23(b)(2) class to litigate a remaining novel claim for relief unfounded in any substantive law requires immediate review.

The district court's attempt to fashion a mandatory, nationwide Rule 23(b)(2) class out of state-law-based consumer fraud damages claims is so novel, will so certainly multiply litigation, and is so unlikely to stand, that this Court should review and reverse it immediately.

A. This is not a Rule 23(b)(2) case, and severing plaintiffs' damages claims for separate litigation cannot make it one.

Rule 23(b)(2) applies to cases in which the final injunctive or declaratory relief the plaintiff seeks will decide the issue for an entire class of people, whether a class action is certified or not. *See, e.g., Allen v. Int'l Truck and Engine Corp.*, 358 F.3d 469, 471 (7th

Cir. 2004) ("The need for, if not inevitability of, class-wide treatment when injunctive relief is at stake is what Rule 23(b)(2) is about.") This is not a Rule 23(b)(2) injunction case; it is a damages case. The putative class members are people who own windows that either have rotted (a small proportion) or that may rot. What these people want is compensation for an alleged harm. They do not want an injunction ordering Pella to stop selling windows. They want money.

Rule 23(b)(2) "does not extend to cases," like this one, "in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Committee Notes to the 1966 Amendments to Fed. R. Civ. P. 23. Nor can a court convert a damages case into a Rule 23(b)(2) case by severing the damages claims for later individual litigation and certifying a class to declare whether the plaintiffs have the right to seek damages. *See Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978-979 (5th Cir. 2000) ("The mere recitation of a request for declaratory relief cannot transform damages claims into a Rule 23(b)(2) class action."). The only declaratory relief that qualifies a claim for Rule 23(b)(2) certification is "final" declaratory relief "corresponding" to a final injunction. Fed. R. Civ. P. 23(b)(2). This Court held in *Andrews v. Chevy Chase Bank* that when declaratory relief "can do no more than simply declare that a certain group of plaintiffs have the right to initiate" a claim for relief, "that is not a form of 'final' declaratory relief under Rule 23(b)(2)." 545 F.3d 570, 577 (7th Cir. 2008).

The district court's class violates both the text of Rule 23(b)(2) and the *Andrews* decision because it

will not finally resolve anything. At most, it will determine whether class members have the right to "file a claim with Pella for service" under a new, court-created warranty, with resulting coverage litigation before a court-appointed special master. Add. 22 and 3 n.3. The order thus does not prevent individual litigation, it requires it. In addition, the district court held that, *regardless* of what happens in the Rule 23(b)(2) action, "the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata." Add. 22. So every member of the Rule 23(b)(2) can file his or her own claim for damages and litigate it simultaneously with the class action.

The consequences of the district court's approach are sweeping. If the district court is correct, a Rule 23(b)(2) class can be certified in every case alleging consumer fraud premised on an alleged omission, and plaintiffs can always litigate individual damages claims in parallel with class claims for "declaratory" relief. This Court should grant immediate review to reject this rewriting of Rule 23(b)(2).

B. The district court's certification of a nationwide class with no analysis of what substantive law will govern plaintiffs' claims is plain error.

The "declarations" that the district court believed provided the basis for the Rule 23(b)(2) class are, moreover, illusory. Plaintiffs have never identified any substantive law that would authorize a decree that Pella's ten-year limited warranty is now a warranty in perpetuity or that would allow a court to create a new window monitoring and replacement

program that Pella must fund and that the federal judiciary will oversee. Add. 3 n.3.

They argued that a nationwide class seeking these declarations was appropriate because the Declaratory Judgment Act, 28 U.S.C. § 2201, creates a federal cause of action. Dkt. 144 ("The claim supporting this class is a federal statute, 28 U.S.C. § 2201, with standard applicability and elements nationwide."). The district court apparently agreed, which is plain error. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). It does not "create[] a substantive cause of action." *Akins v. Penobscot Nation*, 130 F.3d 482, 490 n.8 (1st Cir. 1997); *see also Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008) (the DJA "does not create a basis for class certification under Rule 23(b)(2) if none exists under" the substantive law underpinning the request for relief (internal quotation marks omitted)).

The only possible sources of substantive law for Plaintiffs' claims are the consumer fraud acts of the various states, whose differences this Court has held preclude certification of a nationwide class. "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002). Under Illinois choice-of-law rules, which apply in this case brought under diversity jurisdiction in Illinois, *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), no one state's law governs plaintiffs' claims—a point both plaintiffs and the

district court concede by seeking separate subclasses for different states for the damages claims. That precludes certification of a nationwide class, because "[n]o class action is proper unless all litigants are governed by the same legal rules." *Bridgestone*, 288 F.3d at 1015.

The district court's decision to certify declaratory judgment claims that are pulled from the ether instead of from substantive state law is alone a sufficient reason to grant review. Moreover, claims as novel as plaintiffs' are inappropriate for any class, let alone a national class. They are better adjudicated in individual trials from which a consensus can emerge, rather than all at once in a single action. *See Bridgestone*, 288 F.3d at 1020; *In re: Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *see also Castano*, 84 F.3d at 749 ("certification of an immature tort brings with it unique problems that may consume more judicial resources than certification will save.").

III. The district court's novel attempt to eliminate individual issues by certifying Rule 23(b)(3) classes to litigate only the purportedly common issues requires immediate review.

Rule 23(b)(3) provides no better a method for adjudicating for plaintiffs' predominantly individual claims than Rule 23(b)(2). The district court's certification of six statewide classes to litigate only the purportedly common issues in class members' claims will not prevent individual litigation, it will guarantee it. In addition, it violates clear precedent holding that predominance is measured on the claims as a whole and only when common issues

predominate overall may any issues be certified for class treatment.

Rule 23(c)(4) allows an action to be "maintained as a class action with respect to particular issues" only "[w]hen appropriate." Fed. R. Civ. P. 23(c)(4). It is not appropriate to certify particular issues within a Rule 23(b)(3) damages class when common issues do not predominate in the action as a whole. The Fifth Circuit held this directly: "Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Other circuits are in accord. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) ("Even courts that have approved 'issue certification' have declined to [exercise it] where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) ("We recognize that a court may employ Rule 23(c)(4) to certify a class as to common issues that do exist. ... Nevertheless, in this case, given the number of questions that would remain for individual adjudication, issue certification would not reduce the range of issues in dispute and promote judicial economy." (quotation omitted)).

The same rule is implicit in this Court's decisions. In *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008), the court reversed certification of a

rescission class under the Truth In Lending Act because it found that the most that could be accomplished in the class would be to "declare that a certain group of plaintiffs have the right to *initiate* rescission," leaving the determination whether to award rescission to individual proceedings. *Id.* at 577. Analyzing whether the certification could be upheld under Rule 23(b)(3), the Court addressed whether individual issues would predominate in the litigation as a whole, declaring, "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims." In *Clark v. Experian Information Solutions, Inc.*, the Court affirmed the denial of issue certification under Rule 23(c)(4) because individual issues predominated in the case as a whole, saying, "we find the rationale for denying class certification generally to be applicable." 256 Fed. Appx. at 822. "Because of the need for individualized findings in such a large class, little efficiency would be gained by certifying a class for only particular issues." *Id.* Moreover, in none of the cases cited above where the Court found a lack of predominance—not in *Bridgestone* or *Oshana* or *Clark* or *Thorogood*—did the Court remand to certify a class formed of just the common issues.

Contrary to this authority, the district court's opinion analyzes predominance as if only the issues certified for class treatment count toward the analysis: "[B]ecause I decline to certify a class on the issue of causation and damages, Defendants' argument [about an individual causation issue] is

not an obstacle to certification on issues of liability." Add. 14. This Court should grant review in this case to clarify that predominance is measured on the action as a whole, and to reverse certification of plaintiffs' predominantly individual claims.

IV. Both of the district court's contrived class actions will multiply litigation and violate deeply rooted procedural safeguards that protect plaintiffs and defendants alike.

The one error underlying every other error that the district court committed was its failure to recognize that plaintiffs' claims are so individualized that *no* class, no matter how creatively defined or precisely limited, will be superior to individual adjudication. Insisting on a class for claims as individualized as these puts the court to a choice: (1) multiply litigation and violate the Seventh Amendment by splitting off individual claims and issues for separate adjudication in addition to the class action; or (2) bar individual claims without any presentation in the class litigation through the operation of *res judicata*. Neither choice is superior to individual litigation. In the decision below, the district court chose inefficiency and claim splitting.

A. Any natural presentation of window owners' claims for wood rot would be extraordinarily individualized.

If window owners brought their own suits, and thus had no incentive to abandon individual theories, remedies, or defendants in order to manufacture a class action, they would raise extraordinarily individualized claims for relief. Depending on the law in their respective states, they could sue under theories of express warranty, implied warranty,

common law fraud, and unjust enrichment, in addition to the consumer fraud claim raised on behalf of the class. For relief, they could seek damages for personal injury and loss to property beyond the window itself (such as a damaged wall, floor, or personal property), in addition to the replacement window or out-of-pocket costs for the replacement that the district court is allowing in its classes. (We know such claims may exist, because the named plaintiffs claimed that they had property damage caused by water infiltration and at least one testified that he has personal injuries from mold for which he blamed Pella. Dkt. 117-2, Saltzman Dep. 71-73; Dkt. 117-1, Eubank Dep. 127, 130-131; Dkt. 117-2, Riva Dep. 122. For defendants, they could name not just the manufacturer, but also the contractor who installed the house, adding theories of breach of contract and negligence.

B. In a case this individualized, no class can be certified without either violating rules on claim splitting or summarily barring individual claims.

In a case such as this one, where so many legal claims and injuries potentially exist that cannot be—and will not be—addressed in the class action, no rule of *res judicata* or claim preclusion can make the class action superior to individual litigation. If the unaddressed claims and remedies are barred by *res judicata*, as courts have held they may be, *see, e.g., City of Chicago v. Shalala*, 1998 U.S. Dist. LEXIS 4463, at *27-33 (N.D. Ill. Mar. 31, 1998), then class treatment is inferior for the absent class members who may have claims for much greater relief than are presented in the class extinguished without ever

having been presented. Several courts have denied class certification for this reason. *See, e.g., In re Teflon Prod. Liability Litig.*, 254 F.R.D. 354, 368 (S.D. Iowa 2008); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923-24 (E.D. Pa. 1984); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606-07 and n.7 (S.D.N.Y. 1982). If, on the other hand, the unaddressed claims are not barred by *res judicata*, then the only consequence of the class litigation will be to *multiply* litigation rather economize it.

Multiplying litigation is the path the district court chose for its Rule 23(b)(2) class, where it held that class members are free to litigate separate claims for damages—for the very same claims of defect for the very same windows, based on the very same theories litigated in the class action. Add. 22. This is the ghost of forbidden one-way intervention classes reincarnated in a new form. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (a class must be able to "lose as well as win"). For the Rule 23(b)(3) class, the district court expressed no clear position. It wrote in one place that "[t]he opportunity to opt out ... solves any res judicata problem." Add. 18. In another place, it wrote that "Plaintiffs in this case have not 'abandoned' any claims, since they were never brought in the first place," Add. 20, which both misses the point (individual claims *do* exist, even if plaintiffs did not raise them) and is factually incorrect (plaintiffs *did* raise individual claims that are not part of the class). What is certain is that the Rule 23(b)(3) class certified by the district court will require both class litigation and individual trials to adjudicate fewer theories with fewer available remedies than would be adjudicated in ordinary,

individual litigation. This is the inevitable consequence of forcing class actions on individual claims they do not fit.

C. The subsequent individual litigation required by the district court's order will violate the Seventh Amendment by reexamining factual issues decided in the class trial.

The Seventh Amendment's command that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States," U.S. Const. amend. VII., limits courts' ability to manufacture class actions by dividing claims—and the district court violated it.

In certifying issue classes under Rule 23, courts "must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." *Rhone-Poulenc*, 51 F.3d at 1303. Common issues can be plucked out of individual claims only if the court is able to "carve at the joint." *Id.* at 1302; *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996). In *Rhone-Poulenc*, the district court certified an issue class to litigate whether the defendant was negligent in failing to take certain steps to screen blood fluids and solids for the HIV virus, leaving issues of causation and damages for later, individual trials. *Rhone-Poulenc*, 51 F.3d at 1303. This Court reversed, holding that the juries in the individual trials would necessarily reconsider the defendants' culpability when they determined comparative negligence and proximate cause, thus violating the Seventh Amendment. *Id.*; *see also Castano*, 84 F.3d at 751 ("second jury would be impermissibly reconsidering the findings of a first jury" in considering comparative negligence).

The classes certified below present the very same problems. The issues certified for class treatment include whether aspects of the ProLine windows' design caused windows to prematurely rot and, if so, how large an effect they had. Add. 23. These issues will require the first jury to decide how much design, as opposed to other causes such as improper installation, contributed to rot. The identical issues will be reconsidered in any individual damages actions brought by members of the Rule 23(b)(2) classes. The same issues, moreover, will be reconsidered again and again in each of the individual trials on causation and damages required for members of the Rule 23(b)(3) class. As the Court stated in *Rhone-Poulenc*, "How the resulting inconsistency between juries could be prevented escapes us." 51 F.3d at 1303.

CONCLUSION

The Court should grant review of the district court's novel order certifying Rule 23(b)(2) and Rule 23(b)(3) classes to litigate particular issues within plaintiffs' predominantly individual claims.

Dated: June 26, 2009

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, and WILLIAM and NANCY EHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PELLA CORPORATION, an Iowa corporation, and PELLA WINDOWS AND DOORS, INC., a Delaware corporation,

Defendants.

No. 06 C 4481
Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

Plaintiff window owners filed suit individually and on behalf of all others similarly situated against Defendant Pella alleging fraudulent concealment of an inherent product defect. Plaintiffs are owners of structures with Pella ProLine windows, which they allege have an inherent design defect "that has or will result in rot of the wood components which reduces the windows' useful life to as little as three years." Plaintiffs allege that Defendant manufacturer Pella Corporation and Defendant

reseller Pella Windows and Doors, failed to disclose the defect to Plaintiffs prior to their purchase of the windows. According to Plaintiffs, the wood rot resulting from the defect was so widespread that in 2006, Pella created the ProLine Customer Service Enhancement Program ("PSEP") to compensate customers affected by the defect, however, Pella never informed current customers of the defect or of the PSEP. Plaintiffs further allege that Pella has also failed to inform prospective customers of the defect.

In their first amended complaint, Plaintiffs alleged several counts: (1) violation of consumer fraud statutes, (2) violation of deceptive trade practice acts, (3) fraud by omission, (4) breach of implied warranty of merchantability, (5) unjust enrichment, and (6) declaratory relief pursuant to 28 U.S.C. § 2201. Plaintiffs' fourth count was dismissed based on the statute of limitations. Plaintiffs now move to certify the following classes: (1) Rule 23(b)(3) Statutory Consumer Fraud Class (including seven state-specific subclasses)[1] (2) Rule 23(b)(3) Unjust Enrichment Class,[2] (3) Rule 23(b)(2)

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[1] Rule 23(b)(3) Statutory Consumer Fraud Class: All persons in the states of Illinois, California, Florida, Michigan, New Jersey, New York, and North Carolina, who purchased a Pella ProLine aluminum clad casement window/s and/or own a structure containing a Pella ProLine aluminum clad case window, between January 1, 1991 and present (date of certification).

[2] Rule 23(b)(3) Unjust Enrichment Class: All persons in the states of Illinois, California, Florida, Iowa, Michigan, New Jersey, New York, North Carolina and Ohio who purchased

Declaratory Judgment Class;[3] they seek to reserve their fraud by omission claim for class certification

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Pella ProLine aluminum clad casement windows, between January 1, 1991 and present (date of certification).

[3] Rule 23(b)(2) Declaratory Judgment Class: All persons in the United States who own structures containing Pella ProLine aluminum clad casement windows manufactured from 1991 to present.

Plaintiffs seek the following declaratory relief:

Declaration I: The Court finds that all Pella ProLine aluminum clad casement windows, manufactured from 1991 to present, have a defect in the aluminum cladding of the sash component that allows water to get behind the aluminum cladding resulting in premature rotting of the wood component of the sash which wood rot may progress to adjacent wood components. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure to all of these windows.

Declaration II: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine aluminum clad casement windows manufactured from 1991 to 2003. All persons who owned structures containing ProLine casement windows manufactured from 1991 to 2003 were eligible for this program. Pella however did not disclose to the persons eligible either the existence of the enhancement of their warranties, the limited remediation available, or that the windows covered by the program were defective in material and workmanship when manufactured.

The Court finds that the Pella Service Enhancement Program is a modification of Pella's warranty requiring disclosure to all persons eligible for this Program.

Declaration III: The Court finds that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component

of the window resulting in premature rotting of the wood component, which rot may progress to adjacent wood components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella.

Declaration IV: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine transom, awning and casement windows manufactured from 1991 to 2003. Only persons who owned structures containing ProLine transom, awning and casement windows manufactured from 1991 to 2003 and who repeatedly complained to Pella were purportedly included in and eligible for this program. Because the Court has determined that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component against reasonable expectations, and because the Court has found that Pella knew of this defect when it first manufactured these windows, the Court finds that the Pella Service Enhancement Program is insufficient to remediate the defects know by Pella to exist. The Court therefore declares that Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid, and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation.

Declaration V: The Court declares that Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to ProLine window wood rot, whether internally coded by Pella as 06 or similar.

Declaration VI: The Court declares that Pella shall establish an inspection program and protocol to be

pending further discovery. Plaintiffs also seek individual damages associated with repair and replacement, attorneys' fees and costs, and injunctive relief compelling Defendants (1) to establish a program to inspect, replace and install defective Pella windows; and (2) to re-audit denied warranty claims based on the defect. In considering Plaintiffs' motion for class certification, I may not conduct a preliminary inquiry into the merits of the underlying claims. *Eisen* v. *Carlisle & Jacqueline,* 417 U.S. 156, 177-178 (1974). However, I may look beyond the pleadings to determine whether the requirements of Rule 23 are met. *Szabo* v. *Bridgeport Mach., Inc.,* 249 F.3d 672, 677 (7th Cir. 2001). In order to proceed as a class action, the Plaintiffs must prove their action meets the four requirements of Rule 23(a) and the requirements of at least one subsection of Rule 23(b). *Eisen,* 417 U.S. at 163; *see also Calkins* v. *Fidelity Bond & Mortgage Co.,* No. 94 C 5971, 1998 U.S. Dist. LEXIS 16144, at *2 (N.D. Ill. Oct. 8, 1998). In order to satisfy the four requirements of Rule 23(a), the representative parties must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative

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communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a Special Master appointed by the Court and/or agreed to by the parties.

parties will fairly and adequately protect the interests of the class."

In addition to the four express requirements of Rule 23(a), there are two implied requirements: (1) that an identifiable class exists ("definiteness"), and (2) that the named representatives are members of the class. *LeClercq* v. *Lockformer* Co., No. 00 C 7164, 2001 U.S. Dist. LEXIS 2115, at *5 (N.D. Ill. Feb. 28, 2001). A class can be properly identified so long as it is defined by objective criteria. *Id.* at *5-6. This criteria must make it administratively feasible for the court to determine whether a particular individual is a class member. *Curtis* v. *Voss,* 73 F.R.D. 580, 582 (N.D. Ill. 1976); *see also* 7A Charles A. Wright, Arthur R. Miller, *Federal Practice and Procedure,* § 1760, at 120-121 (1972).

Plaintiffs have proposed several alternative class structures. For the following reasons, I grant, in part, Plaintiffs' Motion for Class Certification, certifying the following classes: (1) a Rule 23(b)(2) declaratory judgment class for all class members whose windows have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced; and (2) a Rule 23(b)(3) statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows. I am denying Plaintiffs' motion to certify an unjust enrichment class.

II. DISCUSSION

A. Rule 23(a) Requirements

1. Implied Requirements

"While the class does not have to be so ascertainable that every potential member can be specifically identified at the commencement of the action, the description of the class must be sufficiently definite so that it is administratively feasible for the court to ascertain whether a particular individual is a member." *Joseph* v. *General Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986); *see also Fournigault* v. *Independence One Mortgage Corp.*, 234 F.R.D. 641, 644 (N.D. Ill. 2006). Defendants claim that Plaintiffs have not adequately set forth identifiable classes, arguing that (1) the majority of Pella's sales are to builders and contractors, and even if an independently-owned distributor has records of the end-user's address, Pella cannot access these records; and (2) Pella is unable to identify end purchasers from its sales to retail stores. Defendants maintain that because Pella records do not identify most class members, individual inquiry would be required to verify that particular class members have the windows in question.

There is some evidence that Pella and its distributors keep some records of purchasers and warranty claims data. Where Pella's records may be insufficient, provision of notice can supplement class identification efforts. Notice by publication has been used in cases where potential class member names were confidential or impracticable to ascertain. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536-537 (3d Cir. 2004) (Where class members were

consumers of a prescription drug, and names and addresses of these consumers were confidential and not available to parties, notice by publication combined with call center and website was sufficient notice to identify class members.); *Macarz* v. *Transworld Sys., Inc.*, 201 F.R.D. 54, 59 (D. Conn. 2001) (notice by publication used where circumstances "make it impracticable to gain the names and addresses of class members and notify them individually of the action's pendency"); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (Internet notice of settlement was acceptable substitute for individual notice where Defendant had no record of part of a class of customers.). Plaintiffs' proposal that notice be made by publication, television and news media, and the Internet is adequate in these circumstances to identify the class members.

Defendants' concern that individual inquiry would be required to verify that particular class members have the windows in question is easily assuaged. Plaintiffs persuasively argue that determining class membership would not be significantly distinct from Pella's routine administration of the PSEP program, and would therefore be effective and impose little burden. First, the same visual inspection done by Pella following a warranty claim can be conducted by the homeowner himself. The notice to class members can include information necessary to conduct a self-inspection, whereby a homeowner could identify his windows as the Pella variety at issue here. Second, Pella

currently accepts photos to assess damage to windows,[4] and there is precedent for the use of photos to document claims in class actions. *See Pelletz* v. *Weyerhaeuser Co.*, 255 F.R.D. 537 (W.D. Wash. 2009) (Claims process in deck building products case was reasonable where it required class members to answer two claim forms and submit ten photographs of alleged product defect.).

Because the class can be relatively easily ascertained through a combination of the use of sales records, publication of notice, and verification by photograph, I find that an identifiable class exists.

Next, Defendants argue that the class definitions are ambiguous because (1) it is unclear whether the term "purchasers" refers to people who purchased their homes from builders or purchased their windows from contractors doing remodeling; (2) it is unclear whether the phrase "persons ... who ... own a structure" includes residents of a class state who own a structure in a non-class state; (3) ProLine casement windows which have since been replaced will not be available for inspection.

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[4] If photographs are inadequate in some cases, claim supplementation may be required. However, even if inspections are necessary, they would not be burdensome to Defendants, as such inspections are already conducted in Pella's normal course of business to provide purchase quotes or repair estimates. Additionally, the PSEP calls for inspection only for customers with ten or more units being replaced, demonstrating that an inspection process is not always necessary for window identification.

"[I]nvestigating whether or not certain prospective class members will fit th[e class definition] criteria goes too far in the direction of judging the merits." *See Fournigault, 234* F.R.D. at 644. However, it is worth noting that at this stage, there does not appear to be much ambiguity with regard to terminology used in defining the classes.[5] The proposed statutory fraud class includes purchasers and owners of a structure. Defendants make much of the indirect purchaser who may have paid a builder or contractor for labor and materials that include Pella windows, and ask whether such a purchaser would be included in the purchaser class. Plaintiffs, however, make it clear that end-users are indeed purchasers. Since the statutory fraud class does not include windows without a manifested defect, builders or contractors who merely purchase a window for installation as part of their work are clearly excluded (assuming that the defect does not manifest itself prior to the sale of the structure containing the window). Furthermore, based on the remedy structure that I am allowing, there is no danger of double recovery on the same window. If the window was repaired or replaced, then it is the party that paid for this repair that stands to recover, whether the purchaser or structure owner. If the window has not been replaced, then there is no relief until and unless the defect manifests.

Defendants next argue that it is unclear whether "persons ... who ... own a structure" include residents

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[5] Plaintiffs note that this terminology is a duplication of Pella's terms in the PSEP documents.

of a class state who own a structure in a non-class state. Intertwined with this argument is another of Defendants' arguments—that Plaintiffs' proposed class is improperly broad because it includes individuals without "standing," as a Plaintiff residing in a class state may have purchased his windows in a non-class state. I address the issue of standing infra, however it is important to note here that, "[a] class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant." *Elliott* v. *ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill. 1992). Any issue relating to whether class members will ultimately be able to prove their damages goes to the merits of the case and not to class certification.

Defendants also point to conflict-of-law concerns, however, "Rule 23 specifically provides for multiple classes in a single case, Fed. R. Civ. P. 23(c)(4)(B), and classes have been certified in cases where multiple classes were required."[6] *Williams v. Chartwell Fin. Servs., 204* F.3d 748, 760 (7th Cir. 2000). Courts have created subclasses to manage any potential conflicts among different state's laws. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004), *cert. denied sub nom. UnitedHealth*

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[6] Rule 23(c)(5) states: "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." According to the Advisory Committee, "[w]here a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966) (currently 23(c)(5)).

Group, Inc. v. Klay, 543 U.S. 1081 (2005) (noting advantages for grouping state laws and certifying subclasses accordingly); *Fournigault, 234* F.R.D. at 643 (certifying seven state subclasses). *Calkins* v. *Fidelity Bond & Mortg. Co.*, No. 94C5971, 1998 WL 719569, at *3 (N.D. Ill. Oct. 8, 1998) (creating state subclasses to avoid conflicts of law); MANUAL FOR COMPLEX LITIGATION (FOURTH) §22.634, p. 412 (2004) (noting the option of creating subclasses if the law of only a few jurisdictions applies).

Finally, even where an individual has allegedly purchased ProLine windows and has already had them replaced, it is possible that that individual will be able to produce proof of class membership. Defendants point to *In re Teflon Products Liability Litigation*, 254 F.R.D. 354, 363 (S.D. Iowa 2008) to support their proposition that discovery would not likely assist the court in determining whether such individuals are class members. In *In re Teflon*, "even after a lengthy discovery period, during which each proposed representative was thoroughly deposed, many individuals themselves [were] unable to ascertain whether they belong in a particular subclass." *Id.* In *Teflon*, Plaintiffs brought claims against DuPont, alleging that it misrepresented the safety of its non-stick cookware coating, which had been shown to decompose at normal cooking temperatures, releasing a potentially harmful synthetic chemical. In most instances, the proposed representatives could not produce any documentation identifying the cookware at issue, nor was visual examination an effective tool for identification. *Id.* at 361-362. However, such is not the case here. The class representatives in this case have been able to produce some documentation or

proof of identification as to the model of windows they own. Unlike the alleged defect in this case, the shortcoming at issue in *Teflon* was not a visible one. Where potential class members have experienced the wood rot at issue in this case, it is possible that they have records of a Pella inspection or have taken photographs of the window that might assist in proving their class membership.

2. Express Requirements

The four requirements of Rule 23(a) the Plaintiffs must prove to proceed as a class are, in short: numerosity, commonality, typicality and adequacy. Numerosity is not at issue in this case.

a. Commonality

Commonality is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Plaintiffs can meet this requirement by showing a common nucleus of operative facts exists between the named plaintiffs and the class. *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998). A common nucleus of operative facts is said to exist when a defendant has "engaged in standardized conduct toward members of the proposed class." *Id.* at 594. The determinative question is whether the same issues would necessarily be re-litigated over and over again if plaintiffs were required to bring separate actions. *Joseph,* 109 F.R.D. at 642 (D. Colo. 1986). In this case, Plaintiffs maintain that common questions include the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the

defect and the PSEP. These are questions that are common to the class, and are allegedly a result of Pella's standardized conduct toward the class members. Were each member in the class to bring separate actions under state consumer fraud statutes, "these questions would necessarily be litigated over and over, and the same evidence would be presented in each case." *Id.*

Defendants argue that a class cannot be defined so broadly so as to include class members "who are without standing to maintain an action on their own behalf." *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982). Defendants point specifically to *Neuser v. Carrier Corporation*, in which the court refused to certify a class of plaintiffs that "own or owned high efficiency furnaces manufactured by Carrier since January 1, 1988." 2007 WL 1470855, at *3 (W.D. Wis. May 15, 2007). In that case, the plaintiffs alleged a defective secondary heat exchanger which increased the failure rate of furnaces containing this component. *Id.* at *2. The court held that certification was inappropriate. Many of the class members had "no claim," because they would have no damages, noting that "it is impossible to distinguish class members whose furnaces will fail from those who will not. The class of plaintiffs for which certification is sought is too broad and there is no reasonable means to reduce it to those individuals who might actually have claims similar to those of the named plaintiffs." *Id.* at *5. Similarly, Defendants claim, most of the putative class members in this case will have windows that manifest no wood deterioration, and that there is no feasible way to distinguish them from those whose windows might manifest a defect in the future.

This analogy fails. In *Neuser,* Plaintiffs brought a contract claim for fraud in the inducement, which requires proof that the defendant knew of the defect and potential product failure, intentionally concealed this fact with intent to induce the plaintiff to purchase the product, and that the purchaser relied on the "assumed durability" of the product and was damaged by the purchase. *Id.* at *3. Damages are an essential element of the claim, and it is clear from the court's ruling that a latent defect does not qualify. In this case, the six statutory consumer fraud subclasses will consist only of plaintiffs with manifest defects.

Plaintiffs argue that common issues also exist as to damages, including the type of injury and the amount of damages, and that such issues will vary by subclass but not by class member. As part of their proposal, Plaintiffs seek as damages out-of-pocket expenses paid by those class members whose windows have manifested the defect, and who have paid to have them replaced. However, the inquiry with regard to damages and causation is too individualized. First, where the window has been removed from the structure and is no longer available, even an on-site inspection will not suffice. Determination of such damages would require findings on several highly individualized issues. Each of these members will have paid different sums for replacement and repairs of varying degrees. Furthermore, each class member who has had windows replaced, and whose windows and wood rot are not available for inspection, will need to provide documentation or other evidence of class membership. Causation will also be an issue relevant to all class members whose windows have

manifest wood rot. In his deposition, Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration in and around the windows. (Still Dep. at 80:19-82:8 and 26:15-27:8). Although issues of liability are common to the class, the questions of causation and damages are not, and it is for this reason that I find certification for common issues of liability under state consumer fraud statutes appropriate, but I decline to certify a class for the issues of causation and damages. *See In re Telectronics Pacing Systems, Inc. Product Liability Litigation*, 164 F.R.D. 222 (S.D. Ohio 1995) (limiting a class suit to liability issues only, and avoiding individualized inquiries that would arrive in determining damages).

b. Typicality

Under Rule 23(a), typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The issue of typicality is closely related to commonality and should be liberally construed. *See Keele*, 149 F.3d at 595; *Whitten* v. *ARS Nat'l Servs. Inc.*, No. 00 C 6080, 2001 WL 1143238, at *3-4 (N.D. Ill. Sept. 26, 2001). The typicality requirement can be met when the representative party's claim arises from the same course of conduct that gives rise to the claims of other class members and all of the claims are based on the same legal theory. *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

First, Defendants claim that because representative Plaintiff Saltzman purchased ProLine casement windows even after he initiated the suit, "issues of materiality and proximate cause are likely

to be a major focus of the litigation of his claim." However, this argument does not demonstrate an atypicality of claims, but rather implicates issues of causation. In cases where plaintiffs allege fraud by omission, relevant state laws apply an objective standard in the determination of whether the omission is material.[7] Saltzman's reasons for purchasing more windows are not relevant to this inquiry. Moreover, because I decline to certify a class on the issue of causation and damages, Defendants' argument is not an obstacle to certification on issues of liability.

Next, Defendants argue that because Saltzman relied on a builder's recommendations in selecting Pella windows, the inquiry will shift to the builder. This inquiry-shift, however, does not apply in omission cases. *See Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 113 (N.D. Ill. 1993) ("Reliance may be presumed where there is a failure to disclose, yet, where a claim involves both omissions and misrepresentations, this presumption

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[7] Under North Carolina law, a duty to disclose must be established for a statutory consumer fraud claim based on a material omission. *Kron Medical Corp.* v. *Collier Cobb & Associ., Inc.*, 420 S.E.2d 192, 197 (N.C. Ct. App. 1992). That duty arises when persons have concealed material facts. *Bear Hollow, L.L.C.* v. *Moberk, L.L.C*, No. 5:05CV210, 2006 WL 1642126, at *6 (W.D.N.C. June 5, 2006). In that context, "[a] fact is material if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced [its] judgment or decision in making the contract at all." *Id.* (quotations omitted). This is a subjective inquiry, which makes a North Carolina subclass inappropriate for certification.

is not available."). Defendants further argue that Saltzman's statutory fraud claim requires individualized inquiries into actual reliance and deception. Because this case involves a failure to disclose, reliance is presumed. No individualized inquiry is required. *See Lipinski v. Martin J Kelly Oldsmobile,* Inc., 759 N.E.2d 66, 70 (Ill. App. 2001) ("it is not necessary ... to show actual reliance in order to state a valid claim based on an omission or concealment under the Consumer Fraud Act.").

Lastly, Defendants argue that because only two named Plaintiffs, residing in subclass states Illinois and Florida, have ProLine casement windows,[8] there are no named Plaintiffs who have standing to sue under the law of the remaining class states – California, Michigan, New York and New Jersey. However, the standing inquiry at this point is limited to an assessment of whether or not the *individual named* Plaintiffs have "suffered an 'injury in fact' which is fairly traceable to the challenged action of the defendant and 'likely,' as opposed to merely 'speculative," to be 'redressed by a favorable decision.'" *Payton* v. *County of Kane,* 308 F.3d 673, 676-677, 682 (7th Cir. 2002) (citations omitted). The Seventh Circuit has followed the Supreme Court's direction in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999) and held that class certification should normally precede Article III standing challenges.

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[8] Named Plaintiff Kent Eubank also has ProLine casement windows installed in his home, however, he resides in Iowa, which is not included in the Plaintiffs' proposed consumer fraud class.

Payton, 308 F.3d at 680. Additionally, courts have permitted named plaintiffs to represent class members from other states in which the representatives did not reside or make purchases. *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 267-69 (D. Mass. 2004) (certifying named plaintiffs who purchased the drug at issue only in certain states to represent class members who purchased the drug in other states, and deferring consideration of argument that named plaintiffs lacked standing to assert claims on behalf of those class members) (citing *Payton*, 308 F.3d at 681).

c. Adequacy

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied where the named representative (1) has retained competent counsel, (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy, and (3) does not have interests antagonistic to those of the class. *In re VMS Ltd. Pshp. Sec. Lit.*, No. 90 C 2412, 1992 U.S. Dist. LEXIS 14445, at *13 (N.D. Ill. Sept. 23, 1992). The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625 (U.S. 1997). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26 (citations omitted). Defendants argue (1) owner's interests diverge from the interests of non-owner purchasers since the court must determine a fixed award for each window in order to prevent double

recovery; (2) the interests of named plaintiffs diverge from those of the class where Plaintiffs are engaged in claim splitting – named Plaintiffs have expressed an intent to seek damages for property damage but are not seeking remedies for such claims on class certification; and (3) the interests of the latent and manifest defect groups are not aligned in that individuals with manifest defects will want immediate payments, and those with latent defects will want a go-to fund for future use.

Defendants' first argument is overcome by the proposed class structure. The declaratory judgment and injunctive relief sought here apply only to a class of structure owners whose windows are either latently defective or are manifesting a defect but have not yet been replaced. The consumer fraud class, seeking damages, includes only those who have had a manifest defect and whose windows have been replaced. If the defect is manifest and the window has not yet been replaced, the remedy is that the window be fixed. If the defect is manifest and the window has been replaced, the party who paid for the replacement, whether the current structure owner or the purchaser of the window, may recover his costs. There is no danger of double recovery.

Defendants' second argument does raise a matter of significant concern. There have been several instances where courts have denied class certification" on the basis that class representatives are inadequate when they opt to pursue certain claims on a class-wide basis while jeopardizing the class members' ability to subsequently pursue other claims." *In re Universal Service Fund Telephone Billing Practices Litigation*, 219 F.R.D. 661, 669 (D.

Kan. 2004). *See, e.g., In re Teflon Products Liability Litigation*, 254 F.R.D. 354, 366-68 (S.D. Iowa 2008) (finding inadequacy of representation where, by abandoning original claims and disavowing others, "the representative plaintiffs risk a future waiver not only of their own [ ] claims, but also those of the absent class members."); *Thompson* v. *American Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999) (finding that "the named Plaintiffs' efforts to reserve personal injury and damage claims may, in fact, jeopardize the class members' rights to bring such claims in a subsequent case."); *Feinstein* v. *Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606-607 (D.C.N.Y. 1982) (finding named plaintiffs to be inadequate representatives where named plaintiffs in defective tire case failed to bring death, injury, accident-related property damages, and other consequential damage claims). The danger with claim-splitting is that res judicata will bar any future – claims by absent class members. As the *Thompson* court cautioned:

> [R]epresentatives who tailored the class claims in an effort to improve the possibility of demonstrating commonality obtained this essentially cosmetic benefit only by presenting putative class members with significant risks of being told later that they impermissibly split a single cause of action.

Thompson, 189 F.R.D. at 547.

If Plaintiffs' claims are true, then all class members have suffered the injury of being sold defective windows—windows whose value has diminished due to the defect. However, the injuries of the named Plaintiffs appear to be more significant

than this. Windows are not stand-alone products; they are incorporated into the structure of a building, and it is certainly possible, in fact, even likely, that wood rot originating in the window itself may cause more widespread problems in the walls, structure, or interior of the building, especially when the entire window must be removed. Although Plaintiffs in this case have at no point pled personal injury or property damage claims, they have expressed some interest in pursuing such claims in the future claims based on the same conduct and transactions that are the subject of the current allegations.[9] It is conceivable that absent class members may also want to bring such claims for

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[9] While deposition testimony is itself not part of the pleadings, "sometimes it maybe necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir. 1993) (citing *General Telephone Co. of Southwest* v. *Falcon* 457 U.S. 147, 160 (1982)); *See Balderos v. Illinois Vehicle Premium Finance Co.*, No. 96 C 8050, 1997 WL 627650, at *4 (N.D. Ill. Oct. 2, 1997) (considering Plaintiff's deposition testimony in determining whether his claims were typical of the class.). In his deposition, Plaintiff Saltzman discusses his desire to recover costs allegedly associated with the wood rot at issue, including stucco repair, the cost of new window moldings, and repainting. (Saltzman Dep. 71:17-73:20). He also mentions potential negative impact on his home's resale value. *Id.* In their depositions, Plaintiffs Kent Eubank. and Riva noted that were they to discover any damage in the walls upon removing their rotted windows, they would seek to recover any associated costs. (K. Eubank. Dep. 127:1-127:4) (T. Riva Dep. At 122:13-122:18). During his deposition, Plaintiff Kent Eubank stated that he hoped to reserve the right to bring a personal injury lawsuit due to his exacerbated mold allergies. (K. Eubank. Dep. 129:13-131:3).

similar damages. The opportunity to opt out as required by Federal Rules of Civil Procedure 23(b)(3) and (c)(2)(B) solves any res judicata problem. As the court explained in *Gasperoni v. Metabolife, Intern. Inc.*, No. 00-71255, 2000 WL 33365948, at *4 (E.D. Mich. Sept. 27, 2000)

> If those people with individual personal injury claims can opt out of the class, or are specifically excluded from the definition of the class, there is no danger of the class waiving any individual claims of its members. Moreover, the only legal issue to be certified is simply whether the label is materially misleading. Any personal injuries that develop in class members after the present suit, will not be subject to res judicata because their claim will not have been actually litigated, nor will it be one that "might have been raised" in the previous suit.

It is clear, however, from the examples discussed *supra*, that not all courts share this view. *See Feinstein*, 535 F. Supp. at 599, 606-07, n.16 (although putative class members in defective tire case asserted no claims for death, injury or accident-related property damage, the court found that they were inadequate class representatives due to the possibility that they were claim-splitting, and '[i]t is difficult to imagine many courts sanctioning separate actions for property and injury claims arising out of the same incident."). Where "the named Plaintiffs have in fact jeopardized the class members' potential claims for personal injury damages, they would be deemed to have interests 'antagonistic' to those of the class." *Thompson v. American Tobacco Co., Inc., 189*

F.R.D. 544, 550 (D. Minn., 1999). However, these cases are distinguishable. In *Feinstein,* the alleged defect at issue spawned "numerous specific actions for death, injury or damage[.]" 535 F. Supp. at 597. In this case, Defendants have presented no evidence of any specific actions alleging damages above and beyond window repair and replacement.[10] In *Thompson,* the plaintiffs reserved the issues of personal injury and damages to make class certification more likely, however, that is not the case here. In this case, Plaintiffs have expressly reserved only claims for fraud by omission, saying nothing of personal injury claims or property damages claims.

Plaintiffs cite *In re Universal Service,* 219 F.R.D. at 669, to support their claim that certification is appropriate here. In that case, Plaintiffs abandoned their common law fraud claims, but continued to pursue all of their other damages claims, including a claim for trebeled damages, "a remedy akin to the punitive damage claim plaintiffs elected to forego when they abandoned their fraud claim." The court noted that the fraud claims were not suitable for class adjudication, and that the plaintiffs were not abandoning stronger claims for money damages in favor of certifying weaker claims. In this case,

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[10] Defendants discuss at length *Pappas v. Pella Corporation,* No. 06 L 12771, Order, Circuit Court of Cook County, at 1-2, Aug. 21,2007, where a similar motion for class certification was brought and denied. In that case, plaintiffs "anticipate[d] that the damages [would] be window replacement or reimbursement for window replacement." Defendants put forth no evidence of specific actions for other types of damages.

named Plaintiffs seek monetary damages in the form of actual out-of-pocket costs of window repair and replacement, as well as declaratory and injunctive relief ordering the re-audit of denied warranty claims and the establishment of an inspection program. Plaintiffs have not abandoned stronger claims in favor of weaker claims; in fact Plaintiffs in this case have not "abandoned" any claims, since they were never brought in the first place. The essence of the issue in this case is an allegedly defective window; any claims for related damages will most likely be less significant and less common. Absent class members will be given the opportunity to opt out of the class if they so choose in order to pursue claims for such damages.[11]

Finally, Defendants argue that interests of class members with manifest wood rot are not aligned with those of class members whose windows are latently defective. However, this argument is based on *Amchem Products*, 521 U.S. at 626, where the Court made note of the disparity between currently injured plaintiffs and exposure-only plaintiffs in an asbestos class action. In that case, "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of

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[11] Plaintiffs argue that class actions are one of "the recognized exceptions to the rule against claim splitting," citing 18 Moore's Federal Practice § 131.40[3][e][iii] (2002) (citing Restatement (Second) of Judgments § 26(1)(c) (1982)). The court in *Makar Issues & Rights, Ltd.* v. *Tellabs, Inc.*, No. 02 C 4356, 2009 WL 448895, *9 (N.D. Ill. Feb. 23, 2009) recently noted this exception. The Seventh Circuit's decision in *Crowder* signals that this circuit recognizes such an exception.

discrete subclasses." *Id.* That is not the case here. Plaintiffs have proposed discrete subclasses designed around the type of injury to the class member. Named Plaintiffs are alleging a mixture of latently defective and manifestly defective windows (both replaced and not yet replaced), so they will adequately be able to represent all of the certified subclasses.

B. Rule 23(b)(2)

Defendants argue that Plaintiffs have failed to satisfy several of the Rule 23(b)(2) requirements for class certification.

1. Action on Grounds Applying Generally to the Class

First, Defendants argue that because Pella found that some named Plaintiffs were eligible for PSEP and others not, they have not "acted or refused to act on grounds that apply generally to the class." Plaintiffs, however, contend that Pella acted or refused to act on grounds that apply generally to the class by failing to disclose material facts about the defect, and by secretly creating and implementing the PSEP and by not applying it consistently. Rule 23(b)(2)

> does not require that all members of the class be aggrieved by the challenged conduct, but proponents of a Rule 23(b)(2) class must be able to demonstrate that the 'conduct or lack of it which is subject to challenge be premised on a ground that is applicable to the entire class,' and that the entry of declaratory or injunctive relief would remove a barrier or impediment common to the class.

Kazarov v. Achim, No. 02-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003) (citation omitted). Plaintiffs allege conduct by Pella that is applicable to the class.

Second, Defendants claim that "in order for a class to be certified under Rule 23(b)(2), the relief sought on behalf of the class must be primarily equitable in nature. The commentary to Rule 23 explains, '[t]his subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. ... The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. *Cima v. WellPoint Health Networks, Inc.*, 250 F.R.D. 374, 380 (S.D. Ill. 2008) (quoting Fed. R. Civ. P. 23 advisory committee's note.). Defendants maintain that the primary relief Plaintiffs request is pecuniary, and therefore, certification under Rule 23(b)(2) is inappropriate. However, the 23(b)(2) class consists only of those class members whose windows have not yet been replaced. The relief for this class is declaratory and injunctive—not monetary. If and when their windows manifest wood rot due to the alleged defect, they may file a claim with Pella for service.

This ties into Defendants' next assertion that "[b]ecause unnamed members are bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class." *In re St. Jude Medical, Inc.* 425 F.3d 1116, 1121-22 (8th Cir.

2005) (citations omitted). It is true that "there is no right to opt out of a Rule 23(b)(2) class action." *Kifer v. Ellsworth,* 346 F.3d 1155, 1157 (7th Cir. 2003) (citations omitted); However, "[a]bsent class members seeking non-incidental money damages may only be barred by res judicata if they have been afforded notice and an opportunity to opt out as required by Rule 23(b)(3) and (c)(2)(B)." *Gates,* 456 F. Supp. 2d at 963 (N.D. Ill., 2006). Since they will not be afforded an opportunity to opt out of the 23(b)(2) class, the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata.

Defendants claim that Plaintiffs' proposed declaratory statement that the alleged defect results in wood rot presumes causation and is inconsistent with the conclusions of the Defense expert. Plaintiffs argue that in their proposed statements, they do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause. In either case, Plaintiffs will have to prove the substance of the declarations they propose, and the inconsistency that Defendants point out can be dealt with during an evaluation of the merits of the case.

C. Rule 23(b)(3)

Defendants argue that Plaintiffs have failed to satisfy several of the Rule 23(b)(3) requirements for class certification.

1. Predominance

"Considerable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely

satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Fournigault,* 234 F.R.D. at 646 (N.D. Ill. 2006) (citations omitted). Plaintiffs argue that common issues as to Pella's liability predominate over individual issues. Specifically, the predominant questions will be the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the defect and the PSEP.

First, Defendants argue that choice of law and standing issues are implicated and are highly individualized inquiries requiring the consideration of facts surrounding each transaction. Plaintiffs respond that their alternative proposal to certify subclasses by each state, to which each state's respective consumer fraud act would apply, makes this irrelevant.[12] According to the Advisory

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[12] In this case, certification of six statutory consumer fraud subclasses is appropriate. Although there are some differences in state consumer protection statutes, the factual and legal questions to be answered are substantively the same. The consumer fraud laws of the six states—California, Florida, Illinois, Michigan, New Jersey and New York—have nearly identical elements: injury, some form of causation and/or reliance, and materiality of the omission in dispute.

Whether the state consumer fraud law requires "injury in fact," "actual loss," "ascertainable: loss," or "actual injury," the case law in five of the six states demonstrates that the diminished value of a defective product satisfies this

requirement. *See Hall* v. *Time Inc.*, 70 Cal. Rptr. 3d 466, 471 (Cal. App. 2008) (recognizing that the unsatisfactory nature of a product or its diminished value are injuries in fact under California law); *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*, No. 03-4558,2008 WL 4126264, at *24-25 (D.N.J. 2008) (applying California law and finding that allegations of van's diminished value due to defect satisfy "injury in fact"); *Collins* v. *Daimler/Chrysler Corp.*, 894 So.2d 988, 990-91 (Fla. App. 2004) (holding that plaintiff possessed standing to assert statutory claim under FDUTPA for alleged economic damages based on latent seat belt defect and noting that "[i]n the context of FDUTPA, 'actual damage' have long been defined as the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.") (quotation omitted); *In re General Motors Type III Door Latch Litigation*, No. 98 C 5836, 2001 WL 103434, at *3 (N.D. Ill. 2001) (noting that "[a]s a general rule, the Illinois Appellate Court has allowed product defect claims in the absence of product malfunction only when the damages claim stems from the diminished value of the defective product."); *Mayhall* v. *A.H. Pond Co., Inc.*, 341 N.W.2d 268, 271-72 (Mich. App. 1983) ("As the frustration of the plaintiffs expectations constitutes an injury for the purposes of proving common-law fraud, so too it constitutes a 'loss' under ... § 11 of the MCPA."); *Talalai* v. *Cooper Tire & Rubber Co.*, 823 A.2d 888, 898 (N.J. Super. Ct. 2001) (Under New Jersey law, "plaintiffs need only demonstrate an ascertainable loss-namely, an estimate of the price to replace the [defective product]"). Therefore, under the laws of these states, the common question of fact is whether the windows are defective. It is true that New York law requires that Plaintiffs prove actual injury. *Hubbard v. General Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996) ("Purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."). Although this may prove to be highly individualized, "the question of injury to individual class members is deferred until after resolution of the common

questions. ... If class certification were denied at this early stage on the basis that injury to individual class members would have to be proven on an individual basis, many classes might never be certified." *Elliott*, 150 F.R.D. at 575.

As far as reliance in cases of omission, individual reliance is not required or may be inferred from the purchase itself. *See Mass Mutual Life Ins. Co.* v. *Superior Court of San Diego County*, 97 Cal. App. 4th 1282, 1293, (Cal. App. 2002) (if plaintiffs succeed in proving allegations of a failure to disclose a material fact associated with the purchase of life insurance policies, "the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient."); *Turner Greenberg Associates, Inc.* v. *Pathman*, 885 So.2d 1004, 1009 (Fla. App. 2004) ("a demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA"). *Lipinski* v. *Martin J. Kelly Oldsmobile, Inc.*, 759 N.E.2d 66, 70 (Ill. App. 2001) ("it is not necessary ... to show actual reliance in order to state a valid claim based on an omission or concealment under the Consumer Fraud Act."); *Dix* v. *American Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987) ("We hold that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations."); *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1086 (N.J. 2007) ("[NJ CFA] essentially replaces reliance, an element of proof traditional to any fraud claim, with the requirement that plaintiff prove ascertainable loss."); *Stutman v. Chemical Bank*, 731 N.E.2d 608, 612 (N.Y. 2000)("reliance is not an element of a [statutory consumer protection] claim.")

Five states require a showing of causation. *See* Fla. Sta. § 501.211(2) (to recover damages, plaintiff must show that loss was a result of the violation); *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801,861 (Ill. 2005) ("Proximate causation is an element of all private causes of action under the Act."); *Gasperoni*, 2000 WL 33365948, at *7 ("reliance and causation are satisfied by proof that plaintiffs purchased and consumed

the product"); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 464-65 (N.J. 1994) ("The 'causation' provision of [N.J. Consumer Fraud Act] requires plaintiff to prove that the unlawful consumer fraud caused his loss."); *Stutman v. Chemical Bank*, 731 N.E.2d at 611 (a plaintiff under NYCFA must prove "that the plaintiff suffered injury as a result of the deceptive act.")

In all of the states, the omission of a material fact is actionable, however, in California, an action may be brought only where there is a duty to disclose. Such a duty arises "when the defendant actively conceals a material fact from the plaintiff." *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007).

Five of the states' laws employ an objective, reasonable consumer standard to determine whether the omission in dispute is material. The standard in Michigan is different. There, an omission is reasonable "only if the omitted fact could not reasonably be known by consumer," *Zine v. Chrysler*, 600 N.W.2d 384, 398 (Mich. App. 1999), which is also an objective standard.

Four states do not require scienter, however two have some form of scienter requirement. In Illinois, plaintiffs must show that defendant intended that they rely on the deception. *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 14 (Ill. App. 2001). This requires defendants to have prior knowledge of the information that they are alleged to have suppressed. *Id.* Under Michigan law, plaintiffs must prove defendant's intent to deceive, *Clement-Rowe v. Michigan Health Care Corp.*, 538 N.W.2d 20, 23 (Mich. App., 1995); *see Zine*, 600 N.W.2d at 398 ("it is proper to construe the provisions of the MCPA with reference to the common-law tort of fraud.") (internal quotations removed). However this may be done on a representative basis, making it appropriate for class treatment. *Gasperoni*, 2000 WL 33365948, at *7. New Jersey law does not require an intent to deceive per se, but does require proof that Defendant acted knowingly in making the omission. *Strawn v. Canuso*, 657 A.2d 420, 429 (N.J. 1995) (superseded on other grounds by N.J.S.A. 46:3C-1 to -12).

Committee, "[w]here a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966). *Calkins v. Fidelity Bond & Mortg. Co.*, No. 94C5971, 1998 WL 719569, at *3 (N.D. Ill. Oct. 8, 1998) (creating state subclasses to avoid conflicts of law); MANUAL FOR COMPLEX LITIGATION (FOURTH) §22.634, p. 412 (2004) (noting the option of creating subclasses if the law of only a few jurisdictions applies).

While there are differences in the standing requirements of each state, as discussed supra, the Seventh Circuit has held that class certification should normally precede Article III standing challenges. *Payton* 308 F.3d. at 680, 682. Furthermore, this court has already denied Defendant's Motion to Dismiss and rejected arguments about the insufficiency of Plaintiffs CFA allegations, including whether they state claims for relief. Therefore, because the class may be divided into individual state subclasses where any conflict exists, and because standing of class members as a whole is not appropriately addressed at this time, Defendants' arguments with regard to predominance do not defeat class certification under Rule 23(b)(3).

Second, Defendants maintain that Illinois' borrowing statute requires that the court apply both

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None of the states' laws require privity.

Despite the differences in state law, it is clear that there are significant questions of fact common to the class with regard to liability and the proposed declaratory judgment.

the Illinois statute of limitations and that of the state supplying the substantive law to determine which is shorter. Accrual and tolling vary by state and therefore an individual determination is required. Plaintiffs, however, note that this Court has rejected the per se prohibition against certification based upon statute of limitations differences on which Pella is insisting. When confronted with this issue in *Sparano* v. *Southland Corp.*, No. 94 C 2098, 1996 WL 681273, at *4 (N.D. Ill., Nov. 21, 1996) this Court stated:

> Defendants claim that the differing state laws regarding statute of limitations and punitive damages will predominate over the common questions. However, the presence of unresolved individual issues of compliance with the statute of limitations does not prevent class actions from proceeding. *Stieberger* v. *Sullivan*, 738 F. Supp. 716, 727 (S.D.N.Y. 1990). Any individual issues dealing with different states' statute of limitations and punitive damage laws can be handled by creating subclasses. Rule 23(b)(3) is therefore satisfied.

See In re Linerboard Antitrust Litig., 305 F.3d 145, 162 (3d Cir. 2002) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)."). Due to the predominance of other issues, differences in applicable statutes of limitations do not bar class certification under Rule 23(b)(3).

Next, Defendants once again raise the issue of causation, arguing that states have unique standards for causation and that individualized inquiries will be required to determine causation of the damage in cases of manifest wood rot (i.e. poor installation). According to Plaintiffs, the fact of damage can be identified through photographic evidence, and there is no need for individual depositions or inspection. Plaintiffs propose photo self-identification with opportunity for follow-up inspection. *See Pelletz*, 2009 WL 59126, at *5. Pella currently permits photographic evidence in its warranty process and does not always make physical inspection when dealing with warranty claims. While this may be the case, even Plaintiffs' expert has noted that improper installation, and other factors apart from any defect, may lead to water infiltration around some of the windows, as well as sheet rock damage. (Still Dep. at 80:19-82:8 and 26:15-27:8). It is clear that in many instances, inspection will be required, and individual inquiries will predominate. However, the fact that proving damages must be handled individually does not preclude certification on the issue of liability. *Allen* v. *International Truck and Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004). ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3.12 at 315 (4th ed. 2002).[13]

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[13] Defendants point to *Pappas v. Pella Corp.*, No 06 L 12771, Order, Circuit Court of Cook County, Illinois, Aug. 21, 2007, at 5, in which the court denied class certification on a similar set of claims and facts, based on predominance. The court found that "there exists such potential vast differences in

Defendants point to *In the Matter of Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 & n.1 (7th Cir. 2002) for the proposition that latent defect members and manifest defect members should not recover along side one another. The court in *Bridgestone* noted that a mixed system, compensating buyers for the risk of a latent defect and buyers who have a manifest defect over compensates buyers and may lead to excess precaution by the manufacturer. *Id.* However, in this case, class members whose defect has not yet manifested are included in the damages class. Only those class members who have experienced a manifest defect and have paid to repair or replace these windows may be entitled to damages. Those class members whose windows have not manifested any defect may be entitled to declaratory and injunctive relief. Only once their windows experience any manifest defect, if indeed they ever do, then those members will be able to submit a claim to Pella for repair. There is no side-by-side recovery here.

Finally, I must address the propriety of an unjust enrichment class. A successful unjust enrichment

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choice of action, type of claimed injury, and especially, the varied causal connections between the claimed injuries and the claimed reason thereof." In that case, Plaintiffs had initially brought and abandoned a breach of warranty claim. The court expressed concern regarding the potential for other class members to bring such a claim in the future. This is not the case here. *See supra*, section II.2.c. Furthermore, I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue.

claim requires proof of three elements: "(1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. The Restatement of Restitution provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other." 26 WILLISTON ON CONTRACTS § 68:5 (4th ed. 2009). "Damages differs from restitution in that damages is measured by the plaintiffs loss; restitution is measured by the defendant's unjust gain." 1 D. DOBBS, REMEDIES § 3.1, at 278 (2d ed. 1993). In this instance, restitution is the price paid by the consumer for the window, minus the diminished value of the window. This value is simply too difficult to quantify, especially on a class-wide basis. Windows are typically part of a larger structure, and many factors play a role in determining the valuation of that structure. Typically, individual pieces of the larger whole are not valued separately, but are rather one piece of the structure. This determination is too difficult to standardize fairly, and individualized issues would certainly dominate. For this reason, I decline to certify an unjust enrichment class.

2. Superiority

Defendants argue that based on the following three reasons, a class action is not the superior method for adjudicating the controversy: (1) individualized issues make it unmanageable;

(2) Seventh Amendment issues; (3) notice is problematic and not all members will be identified.

As discussed supra, neither individualized issues nor notice issues makes class certification unmanageable, and I need not address the issues further here. Defendants further claim that they will insist on their Seventh Amendment right to a jury trial and will not relinquish their right to proof of injury. However, "the question of injury to individual class members is deferred until after resolution of the common questions. ... If class certification were denied at this early stage on the basis that injury to individual class members would have to be proven on an individual basis, many classes might never be certified." *Elliott,* 150 F.R.D. at 575. Because I am certifying the consumer fraud class as to the issue of liability only, and damages will be handled individually, issues will not be overlapping, and the same issue will not be reexamined by different juries. *See In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1303 (7th Cir. 1995) ("[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries."). Because common issues of law and fact predominate, and trying these claims separately would result in a substantial amount of repetition, I find that proceeding as a class action is the superior form of adjudication for this case.

III. CONCLUSION

For the foregoing reasons, I grant, in part, Plaintiffs' Motion for Class Certification, certifying the following classes: (1) a Rule 23(b)(2) declaratory judgment class for all class members whose windows

have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced; and (2) a Rule 23(b)(3) statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows. I deny Plaintiffs' motion to certify an unjust enrichment class.

ENTER:

/s/
James B. Zagel
United States District Judge

DATE: June 4, 2009

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, LUBO and MAIRA HADJIPPETKOV, WILLIAM and NANCY EHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PELLA CORPORATION, an Iowa corporation, and PELLA WINDOWS AND DOORS, INC., a Delaware corporation,

Defendants.

No. 06 C 4481
Judge James B. Zagel

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs Dr. Leonard E. Saltzman, Kent Eubank, Thomas Riva, Lubo and Maria Hadjipetkov, and William and Nancy Ehorn, individually and on behalf of all others similarly situated, allege as and for their Class Action Complaint against defendants Pella Corporation and Pella Windows and Doors, Inc. (collectively "Pella" or "Defendants"), upon personal knowledge as to themselves and their own acts, and as to all other matters upon information and belief,

based upon, *inter alia*, the investigation made by their attorneys, as follows:

INTRODUCTION

1. This is a proposed class action brought by Plaintiffs on behalf of themselves and other consumers of Pella brand windows and doors (collectively, "Pella windows"), as defined more fully herein. Plaintiffs and the proposed class are owners of structures that contain Pella aluminum-clad windows. Unknown to Plaintiffs and the Class, Pella aluminum-clad windows contain a latent defect that allows water to penetrate and leak behind the aluminum cladding, resulting in premature wood rot and other physical damage to both the window and main structure. Pella's acts and omissions in connection with its sale and delivery of these defective windows violate the consumer protection laws of the states of residence of Plaintiffs and the class, and constitute common law fraud, breach of implied warranty, unjust enrichment and declaratory relief as appropriate.

PARTIES

2. *Dr. Leonard E. Saltzman.* Plaintiff Dr. Leonard E. Saltzman is a natural person and citizen of Illinois.

3. *Kent Eubank.* Plaintiff Kent Eubank is a natural person and citizen of Iowa.

4. *Thomas Riva.* Plaintiff Thomas Riva is a natural person and citizen of Florida.

5. *Lubo and Maria Hadjipetkov.* Plaintiffs Lubo and Maria Hadjipetkov are natural persons and citizens of New Jersey.

6. *William and Nancy Ehorn.* Plaintiffs William and Nancy Ehorn [are] natural persons and citizens of California.

7. *Pella Corporation.* Defendant Pella Corporation is a corporation organized under the laws of Iowa with its principal place of business in Pella, Iowa.

8. *Pella Windows and Doors, Inc.* Defendant Pella Windows and Doors, Inc., is a Delaware corporation with its principal place of business in Pella, Iowa.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction of the claims asserted herein pursuant to 28 U.S.C. §§ 1331 and 1332(d)(2)(A) in that the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which members of the putative plaintiff class are citizens of States different from Defendants.

10. Venue is proper pursuant to 15 U.S.C. § 80b-14 and 28 U.S.C. § 1391. Defendants regularly transact and solicit business in this District.

OVERVIEW

11. This case concerns Pella's failure to disclose to purchasers of its aluminum clad windows and doors (collectively, "Pella windows") that there was a substantial risk those windows would develop leaks because of the defect alleged herein, and that (a) the defect might not exhibit itself until after the warranty period expired, and that (b) if the latent defect did not exhibit itself until after the warranty expired, Pella was not committing to repair it.

12. In essence, Pella knew, prior to sale to Plaintiff and the Class that, for the indefinite future, there was a substantial risk that its aluminum clad windows would leak and would have wood rot. Nevertheless, Pella failed to disclose that risk and thereby deprived consumers of the opportunity to negotiate additional warranty coverage, negotiate a lower price to reflect the risk or simply avoid the risk altogether by purchasing a different manufacturer's windows. Thereafter, the undisclosed risk occurred—plaintiffs' windows (and thousand [*sic*] of others) have leaked—and Plaintiffs and the Class have been damaged in the amount it will cost, or they paid, to repair the condition.

13. U.S. consumers reasonably expect that their windows will not leak due to defective design and manufacturing processes, and U.S. consumers simply had no expectation that Pella's windows would leak.

14. Further, consumers reasonably expect that if Pella knew that it had an inherent defect problem with leaks developing:

(a) that a manufacturer such as Pella would make a disclosure to consumers if it determined there was a widespread leakage problem—i.e., that Pella would make a disclosure if it determined that the leakage risk was no longer insubstantial;

(b) that a manufacturer such as Pella would repair the latent defect—even if the defect did not exhibit itself until after the warranty period expired—because the potential causes of the defect are within the control and responsibility of the manufacturer (not the consumer).

PELLA'S CONDUCT WITH RESPECT TO THE WIDESPREAD LEAKAGE PROBLEM AT ISSUE HERE

15. Prior to Plaintiffs' purchases, if not before, Pella was aware that its windows contained an inherent defect that permitted leakage.

16. Pella knew (or but for its reckless indifference would have known) that it was receiving and was going to continue [to] receive reports of leakage. Based on its leakage experience, Pella also knew that even if it diligently investigated its widespread problem, it could take years to: (a) determine why the problem had developed, (b) conclude what steps should be taken to solve the problem, and then (c) implement those fixes.

17. Thus, Pella knew (or but for its reckless indifference would have known) that for the indefinite future: (a) the risk of leakage was substantial, (b) Pella's customers were unaware of that substantial risk, and (c) those customers had a reasonable expectation that Pella would disclose that risk and cure the latent defect, even if the defect (leakage) did not exhibit itself until after the warranty period had expired.

18. Despite such knowledge, Pella did not disclose to prospective purchasers that: (a) there was a substantial risk [their] windows would manifest the defect (leaks), (b) the defect might not exhibit itself until after the warranty expired, and that (c) if the latent defect did not exhibit itself until after the warranty expired, Pella was not committing to repair it.

19. Furthermore, when questioned about leakage problems, Pella would claim faulty installation as the culprit, or would deny claims as "out of warranty" without disclosing the defect.

20. On information and belief, in an attempt to correct the defect, Pella recently changed the way it applies glue sealant to the window's sash line. While the sealant had previously been manually applied, in or about April 2006, Pella purchased a machine that now applies the glue sealant.

21. On information and belief, in an attempt to correct the defect, Pella recently changed the sealant applied to the wood behind the aluminum cladding. The previous wood sealant had failed to protect the wood when exposed to moisture from leaking.

NAMED PLAINTIFFS' ALLEGATIONS

22. **Dr. Leonard Saltzman.** On or about August 31, 1995, Plaintiff purchased several Pella "ProLine" aluminum-clad wood windows for installation at his residence in Lake Forest, Illinois. The cost of the windows and installation was $29,846.03.

23. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which ultimately caused condensation, wood rot, leaks and other failures.

24. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

25. In or about May, 2005, Plaintiff discovered water leaks, condensation, wood rot and other damage to the windows and main structure of his home.

26. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused on grounds that the windows were no longer under warranty. Pella further, as part of its scheme to defraud, attributed the damage to faulty installation.

27. The following are representative of the defect and damage:

[PHOTOGRAPH NOT REPRODUCED]

28. **Kent Eubank.** Plaintiff built his home in 1992, and had Pella "ProLine" aluminum-clad windows installed in his residence in West Des Moines, Iowa. The cost of the windows, not including installation of finishing of wood trim, was approximately $20,000.00.

29. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

30. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

31. In 2001, Plaintiff contacted Pella to correct a few problems at Pella's expense, which it refused on

the grounds that the windows were no longer under warranty. Pella did put silicon caulk around the windows as a repair and charged Plaintiff for it.

32. In September 2006, Plaintiff discovered that several sashes had deteriorated, including one that had deteriorated to the point that the glass had fallen down about an inch behind the aluminum clad of the window.

33. Upon discovering the aforesaid damage, Plaintiff again contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused on grounds that the windows were no longer under warranty.

34. The following are representative of the defect and damage:

[PHOTOGRAPH NOT REPRODUCED]

35. **Thomas Riva.** Plaintiff built his home in 2001, and had Pella "Architect" and "ProLine" aluminum-clad windows installed in his residence in Sarasota, Florida. The cost of the windows and installation was approximately $20,000.

36. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

37. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

38. In approximately 2004, Plaintiff discovered water leaks, condensation, wood rot and other damage to the windows and main structure of his home.

39. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and required Plaintiff to pay $75.00 per window to measure and replace.

40. The following are representative of the defect and damage:

[PHOTOGRAPH NOT REPRODUCED]

41. **Lubo and Maria Hadjipetkov**. Plaintiffs added a second story to their home in 2003, and had Pella "Architect" aluminum-clad windows installed in their residence in Montclair, New Jersey. The cost of the windows and installation was in excess of $20,000.00.

42. Pella aluminum-clad wood windows, unknown to Plaintiffs, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

43. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

44. In approximately late 2004, Plaintiffs, upon moving back into the house, discovered water leaks, condensation, and other damage to the windows and main structure of his home.

45. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and told Plaintiffs that the leaks were due to improper installation and improper maintenance.

46. The following are representative of the defect and damage:

[PHOTOGRAPH NOT REPRODUCED]

47. **William and Nancy Ehorn.** In October 1990, Plaintiffs installed Pella Architect Series windows in their home in Smith River, California.

48. Pella aluminum-clad wood windows, unknown to Plaintiffs, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

49. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

50. Plaintiffs have water leaks, condensation, wood rot and other damage to the windows and main structure of [their] home.

51. Beginning in January 1992, and continuing to the present, Plaintiffs have contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and told Plaintiffs that the leaks were due to improper installation and improper maintenance.

52. The following are representative of the defect and damage:

[PHOTOGRAPH NOT REPRODUCED]

53. The latent defect described herein is found on Pella's ProLine, Architect Series and Designer Series aluminum-clad windows. With respect to the defect at issue, these aluminum-clad wood windows share the same design characteristics and manufacturing methods. The design characteristics and manufacturing methods used by Pella to produce aluminum-clad wood windows resulted in the damages caused Plaintiff and the class.

54. The latent defect at issue here is a necessary cause of the water leaks and resulting wood rot and damage; the presence of water leaks and the resulting wood rot and other damages necessarily implies that the latent defect preceded it. The presence of the latent defect, however, does not imply that water leaks and the resulting wood rot and damage will occur.

CLASS ACTION ALLEGATIONS

55. Plaintiffs bring all claims herein as class claims pursuant to Fed. R. Civ. P. 23. The requirements of Fed. R. Civ. P. 23(a), (b)(2) and (b)(3) are met with respect to the class defined below.

A. Class Definition(s)

56. The (b)(2) Injunctive Relief Class consists of:

> All persons who own a structure with Pella ProLine, Architect Series and Designer

Series aluminum-clad windows and doors (the "Class").[1]

57. The (b)(3) State Sub-Classes consist of:

Illinois: All persons who own a structure, on property located in Illinois, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Illinois Sub-Class");

Iowa: All persons who own a structure, on property located in Iowa, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Iowa Sub-Class"); and

Florida: All persons who own a structure, on property located in Florida, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Florida Sub-Class").

New Jersey: All persons who own a structure, on property located in New Jersey, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "New Jersey Sub-Class").

California: All persons who own a structure, on property located in California, with Pella ProLine, Architect Series and

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[1] Plaintiff reserves the right to amend the class definition based upon future investigation, discovery and the proofs at trial.

Designer Series aluminum-clad windows and doors (the "California Sub-Class").

Texas: All persons who own a structure, on property located in Texas, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Texas Sub-Class").

New York: All persons who own a structure, on property located in New York, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "New York Sub-Class").

Ohio: All persons who own a structure, on property located in Ohio, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Ohio Sub-Class").

Michigan: All persons who own a structure, on property located in Michigan, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Michigan Sub-Class").

North Carolina: All persons who own a structure, on property located in North Carolina, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "North Carolina Sub-Class").

Excluded from the Class(es) are: Defendants, any entities in which they have a controlling interest, any of their parents, subsidiaries, affiliates, officers, directors, employees and members of such persons

immediate families, and the presiding judge(s) in this case and his, her or their immediate family.

B. Numerosity

58. At this time, Plaintiffs do not know the exact size of the Class; however, due to the nature of the trade and commerce involved, Plaintiffs believe that the Class members are so numerous that joinder of all members is impracticable. The number and identities of Class members is administratively feasible and can be determined through appropriate discovery.

C. Commonality

59. There are questions of law or fact common to the class, including at least the following:

(a) Whether Pella aluminum clad windows and doors contain the latent defect alleged herein;

(b) Whether the complained of defect caused the damages of Plaintiffs and other members of the Class;

(c) Whether the latent defect is a necessary cause of the water leaks and resulting wood rot and damage;

(d) Whether Defendants had actual or imputed knowledge of the defect but failed to disclose it to Plaintiffs or the Class;

(e) Whether Defendants have a pattern and practice of attributing damages claimed by Plaintiffs and the Class to "faulty installation" or improper maintenance, and not due to the complained of defect;

(f) Whether Defendants have a pattern and practice of denying Plaintiffs' and the Class' claims as 'out of warranty', and not due to the complained of defect;

(g) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;

(h) Whether Defendants' conduct constitutes consumer fraud and/or common law fraud;

(i) Whether Defendants were unjustly enriched by their conduct;

(j) Whether Plaintiffs and other members of the Class have been damaged, and if so, what is the proper measure of such damages?

D. Typicality

60. Plaintiff has the same interests in this matter as all other members of the Class, and his claims are typical of all members of the class.

E. Adequacy

61. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in the prosecution and successful resolution of consumer class actions. Plaintiffs will fairly and adequately represent the interests of the Class members and do not have interests adverse to the Class.

F. The Prerequisites of Rule 23(b)(2) are Satisfied

62. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to

Fed. R. Civ. P. 23(b)(2) exist as Defendants have acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole.

63. The prosecution of separate actions by members of the class would create a risk of establishing incompatible standards of conduct for Defendants. For example, one court might decide that the challenged actions are illegal and enjoin them, while another court might decide that those same actions are not illegal. Individual actions may, as a practical matter, be dispositive of the interest of Class members, who would not be parties to those actions.

64. Defendants' actions are generally applicable to the Class as a whole, and Plaintiffs seek, *inter alia*, equitable remedies with respect to the class as a whole.

65. Defendants' systemic policy and practices make declaratory relief with respect to the class as a whole appropriate.

G. The Prerequisites of Rule 23(b)(3) are Satisfied

66. This case satisfies the prerequisites of Fed. R. Civ. P. 23(b)(3). The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the Class will prosecute separate actions is remote due to the extensive time and considerable expense necessary

to conduct such litigation, especially when compared to the relatively modest amount of monetary, injunctive and equitable relief at issue for each individual Class member. This action will be prosecuted in a fashion to ensure the Court's able management of this case as a class action on behalf of the class defined above.

FRAUDULENT CONCEALMENT

67. Throughout the Class period, Defendants affirmatively concealed from Plaintiffs and Class the defect described herein.

68. Defendants had a duty to inform Plaintiffs and Class of the defect described herein, which it knew of or should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs or the Class; rather, Defendants attributed resulting damage to faulty installation, maintenance or other third-party conduct.

69. Despite exercising reasonable diligence, Plaintiffs and Class could not have discovered the defects or Defendants' scheme to avoid disclosure of the defect. Thus, running of the statute of limitations has been tolled with respect to any claims that Plaintiffs or the Class have brought or could have brought as a result of the unlawful and fraudulent course of conduct described herein.

70. Defendants are further estopped from asserting any statute of limitations defense, contractual or otherwise, to the claims alleged herein by virtue of its acts of fraudulent concealment.

CAUSES OF ACTION

COUNT I

(Violation of Illinois Consumer Fraud and Deceptive Business Practices Act and Substantially Similar Laws of Certain Other States)

71. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

72. At all times relevant hereto, there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* and substantially similar state consumer protection statutes (the "Act"). Similar statutes, identical in their material respects, are in effect in many jurisdictions within the United States.[2]

73. Section 2 of the Act provides in relevant part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any

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[2] The consumer fraud claims of Plaintiff and resident absent class members is brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* The consumer fraud claims of nonresident absent class members are brought under the consumer protection statute(s) of their respective states of residence. *See e.g.*, Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Bus. & Prof. Code § 17500 *et seq.* (California); Fla. Stat. Ann. § 501.201 *et seq.* (Florida); Mich. Stat. Ann. § 19.418(1) *et seq.* (Michigan); N.J. Rev. Stat. § 56:8-1 *et seq.*, N.J. Rev. Stat. § 56:12-1 *et seq.* (New Jersey); N.Y. Gen. Bus. Law. § 349 *et seq.* (New York); N.C. Gen. Stat. § 75-1 *et seq.* (North Carolina).

> deceptive, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/2 (footnotes omitted).

74. Plaintiffs and other Class members are consumers within the meaning of Consumer Fraud Acts given that Defendants' business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.

75. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, renders unlawful the "use or employment of any deception [including the] concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce ..." Illinois case law holds that reliance on the deception is not an element of a consumer fraud claim.

76. Except as noted below, the consumer fraud statutes and/or interpretative case law of Illinois' sister states have also either: (a) expressly prohibited omissions of material fact, without regard for reliance on the deception, or (b) have not addressed those issues.

77. Once the defect's risk became significant, consumers (such as Plaintiffs) were entitled to disclosure of that fact because:

(a) A significant risk of leakage would be a material fact in a consumer's decision-making process, and

(b) Without Pella's disclosure, consumers would not know that there is any risk of leakage.

78. Moreover, because Pella's warranties are limited in duration, consumers were further entitled to know that leakage might not exhibit itself until after their warranties expired, and if that occurred, Pella was not committing to repair the condition. All of these facts were material to consumers' (such as Plaintiffs') purchase decisions.

79. Specifically, at all times relevant, Pella continuously and consistently failed to disclose to consumers (such as Plaintiffs):

(a) there was a substantial risk of leakage or wood rot;

(b) that leakage or wood rot may not exhibit itself until after the warranty has expired; and

(c) that if leakage or wood rot exhibited itself after the warranty period expired Pella was

not committing to repair the condition. Pella failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

80. Pella intended that Plaintiffs and the Class would rely on the deception by purchasing its windows, unaware of the material facts described above. This conduct constitutes consumer fraud within the meaning of the various consumer protection statutes.

81. Plaintiffs and the Class have been damaged by Pella's deception because: (a) they purchased Pella windows that developed the undisclosed risk/defect—leakage and wood rot, (b) in many instances the condition exhibited itself after Plaintiffs' warranty period expired, and (c) Pella refused to pay to repair the condition because the warranty had expired.

82. If Pella had disclosed the above facts to Plaintiffs, they could have (and would have) prevented economic injury by either negotiating additional warranty coverage, negotiating a lower price to reflect risk or simply avoiding the risk altogether by purchasing a different manufacturer's windows.

83. Defendants have committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defects.

84. Defendants' conduct alleged herein is furthermore unfair insofar as it offends public policy;

is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

85. As a direct and proximate result of the unfair acts or practices of Defendants alleged herein, Plaintiffs and other members of the Class were damaged.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just

COUNT II

(Violation of Similar Uniform Deceptive Trade Practices Acts)

86. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

87. At all times relevant hereto, there was in full force and effect the Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS 510/1. Similar statutes, identical in their material respects, are in effect in many jurisdictions within the United States.[3]

88. The UDTPA prohibits, *inter alia*, representing that goods have characteristics, ingredients, uses, or benefits that they do not have. 815 ILCS 510/2(5).

89. Specifically, at all times relevant, Pella continuously and consistently represented to the marketplace that:

(a) Pella windows were durable;

(b) Pella windows were manufactured to high quality standards;

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[3] *See e.g.*, Fla. Stat. Ann. § 501.204(1) *et seq.* (Florida); Iowa Code § 714.16.2(a) *et seq.* (Iowa); N.J. Rev. Stat. § 56:8-2 *et seq.*; (New Jersey); Colo. Rev. Stat. § 6-1-101 *et seq.* (Colorado); Del. Code Ann. Tit. 6, § 2513 *et seq.* (Delaware); Ga. Code Ann. § 10-1-393(a) *et seq.* (Georgia); Me. Rev. Stat. Ann. Tit. 5, § 207 *et seq.* (Maine); Minn. Stat. § 325D.44 *et seq.* (Minnesota); N.M. Stat. Ann. § 57-12-3 *et seq.* (New Mexico); Ohio Rev. Code Ann. § 1345.02(a) *et seq.* (Ohio); Or. Rev. Stat. § 646.605 *et seq.* (Oregon).

(c) Pella windows were maintenance free; . and

(d) Pella would stand behind its products.

90. Defendants have committed deceptive acts or practices within the meaning of UDTPA by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defects.

91. As a result of Defendants' violation of UDTPA, Plaintiffs and other members of the Class sustained loss or damages and are entitled to equitable relief.

92. Plaintiffs seek relief including compelling Defendants to establish a program to inspect, replace and install defective Pella windows; and compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just.

COUNT III

(Common Law Fraud by Omission)

93. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

94. Pella, through its experience, was in a position of superiority over Plaintiffs and class members with respect to knowledge that: (a) there was a substantial risk that its windows would develop leaks and wood rot, (b) the defect might not exhibit itself until after the warranty period expired, and that (c) Pella was not committing to repair the latent defect if it exhibited itself after the warranty period expired.

95. In other words, once the risk of the leaks became significant, consumers (such as Plaintiffs) were entitled to disclosure of that fact because:

(a) A significant risk of window leakage would be a material fact in a consumer's decision-making process; and

(b) without Pella's disclosure, consumers would not know that there is any risk of leakage.

96. Moreover, because Pella's warranties are limited in duration, consumers were further entitled to know that leakage might not exhibit itself until after their warranties expire, and if that occurred, Pella was not committing to repair the condition. All of these facts were material to consumers' (such as Plaintiffs') purchase decisions.

97. Specifically, at all times relevant, Pella continuously and consistently failed to disclose to consumers (such as Plaintiffs):

(a) there was a substantial risk of leakage or wood rot;

(b) that leakage or wood rot may not exhibit itself until after the warranty has expired; and

(c) that if leakage or wood rot exhibited itself after the warranty period expired Pella was not committing to repair the condition.

Pella failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

98. Plaintiffs and the Class reasonably relied on Pella to disclose those material facts.

If Pella had disclosed the above facts to Plaintiffs and the Class, they could have (and would have) prevented economic injury by either negotiating additional warranty coverage, negotiating a lower

price to reflect the risk or simply avoiding the risk by purchasing a different manufacturer's windows.

99. Pella failed to disclose those material facts and, as a proximate result, Plaintiffs and the Class have been damaged because: (a) they purchased Pella windows that developed the undisclosed risk – leakage, (b) the condition exhibited itself after Plaintiffs' warranty period expired, and (c) Pella refused to repair the condition because the warranties had expired.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

COUNT IV

(Breach of Implied Warranty of Merchantability)

100. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

101. The Pella windows installed in structures owned by Plaintiffs and the Class were defectively made, having left Defendants' manufacturing facilities with the latent defect.

102. At all times relevant hereto, there was duty imposed by law which requires that a manufacturer or seller's product be reasonably fit for the purposes for which such products are used, and that product be acceptable in trade for the product description.

103. Notwithstanding the aforementioned duty, at the time of delivery, Pella aluminum-clad windows sold to Plaintiffs and the Class were not merchantable.

104. As documented in its own business records and elsewhere, Defendants were notified that its aluminum-clad windows were not merchantable with a reasonable time after the latent defect manifested itself to Plaintiffs and the Class.

105. As a result of the non-merchantability of the Pella aluminum-clad windows described herein,

Plaintiffs and other members of the Class sustained a loss or damages.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

COUNT V

(Unjust Enrichment)

106. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

107. The latent defects were a result of the design of the windows.

108. The latent defects did not exhibit themselves until after the warranty period had expired.

109. Plaintiffs and the Class have conferred benefits on Defendants by purchasing Pella windows.

110. Defendants have knowingly and willingly accepted these benefits from Plaintiffs and the Class.

111. Under the circumstances, it is inequitable for Defendants to retain these benefits at the expense of Plaintiffs and the Class.

112. Defendants have been unjustly enriched at the expense of and detriment of Plaintiffs and the Class by wrongfully collecting money to which Defendants, in equity, is not entitled.

113. Plaintiffs and the Class are entitled to recover from Defendants all amounts wrongfully collected and improperly retained by Defendants, plus interest thereon.

114. As a direct and proximate result of Defendants' unjust enrichment, Plaintiffs and the Class have suffered injury and are entitled to reimbursement, restitution and disgorgement from Defendants of the benefits conferred by Plaintiffs and the Class.

115. Plaintiffs and the Class have no adequate remedy at law.

116. Plaintiffs seek to obtain a pecuniary benefit for the Class in the form of all reimbursement, restitution and disgorgement from Defendants. Plaintiffs' counsel are entitled to recover their reasonable attorneys' fees and expenses as a result of the conference of a pecuniary benefit on behalf of the Class, and will seek an award of such fees and expenses at the appropriate time.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella

customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

COUNT VI

(Declaratory Relief Pursuant To 28 U.S.C. § 2201)

117. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

118. There is an actual controversy between Pella and the Class concerning the validity of the time limitations in the warranty on Pella's windows, and concerning installation and maintenance defenses to otherwise valid warranty claims. A copy of Pella's warranty is attached as Exhibit 1.

119. Pursuant to 28 U.S.C. § 2201 this Court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

120. Pella has wrongfully denied warranty claims as untimely or based on installation and maintenance defenses despite the root cause of leaks and wood rot being the latent defects described herein.

121. Accordingly, Plaintiffs seek a declaration that the Pella window warranties regarding the 10 year time limitations on manufacturing defects in material or workmanship are void, invalid and not enforceable.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Declaratory Relief Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

DATED: November 8, 2006

Respectfully submitted,

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No. 10-355

IN THE

Supreme Court of the United States

Pella Corporation and
Pella Windows and Doors, Inc.,

Petitioners,

v.

Leonard E. Saltzman, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 10, 2010

QUESTIONS PRESENTED

1. Whether a court errs by certifying a Rule 23(b)(3) class, where it finds that common questions predominate, if the class certification is limited to these common questions.

2. Whether a court errs by certifying a Rule 23(b)(2) class for final declaratory relief where some class members might later pursue additional equitable relief.

3. Whether a court certifying a Rule 23(b)(2) class necessarily errs by analyzing the underlying state laws for consistency after certification rather than before.

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INTRODUCTION

The district court's order in this case consisted of an unremarkable finding that class certification was warranted because the plaintiffs had satisfied the requirements of Rule 23. In a careful opinion, the court identified a set of common factual and legal questions among the plaintiffs' claims that it held predominated over individual questions. It also found that the petitioners, Pella Corporation and Pella Windows and Doors, Inc. ("Pella"), had acted on grounds that apply generally to the plaintiff class. The Seventh Circuit (Judges Posner, Williams, and Tinder) granted Pella's request for interlocutory review not because it identified anything noteworthy in the district court's order but rather, it stated, because it wished to address—and reject—Pella's broad argument that consumer fraud claims are never appropriate for class treatment. Again in this Court, Pella seeks to establish a *per se* rule that consumer fraud claims are always inappropriate for class treatment, irrespective of predominance and superiority, thereby denying discretion to district courts to resolve consumer fraud claims by class treatment even where Rule 23 is satisfied.

Specifically, Pella asserts that the Seventh Circuit waded into a dispute among the appellate courts regarding the use of "issue" classes. In support, Pella cites decisions from other circuits addressing whether courts may certify classes for "particular issues" under Rule 23(c)(4) even if the certification requirements of Rule 23(b) have not been met. The Seventh Circuit, however, took no position on this question. It had no need to because the district court held that common questions predominate over questions affect-

ing individual class members and that Rule 23(b)(3) is thus satisfied.

Pella also offers this Court a novel interpretation of Rule 23(b)(3). According to Pella, certification is categorically impermissible if individual causation questions must be addressed in subsequent proceedings, regardless of the particular circumstances in the case. The Seventh Circuit's refusal to embrace this interpretation allegedly "departed from the path other courts have followed in addressing these important class-action questions." Pet. 2. Yet Pella identifies no opinion from any court that adheres to its categorical interpretation of the Rule. This Court is not the proper venue for Pella to test-drive novel interpretations of the Federal Rules.

With respect to certification of the Rule 23(b)(2) class, Pella argues that the declaratory relief sought is unacceptably "non-final" because of the possibility that individual warranty disputes might still occur after the relief is granted. Pella again posits a novel and categorical interpretation of the Rule, arguing that (b)(2) certification for declaratory relief is impermissible if subsequent individual disputes might occur. Pella's premise is incorrect: the declaratory relief sought for this (b)(2) class constitutes final relief, notwithstanding the possibility that Pella may later dispute individual class members' warranty claims. More importantly, Pella offers no evidence of any conflict among the circuits regarding the "finality" of declaratory relief under Rule 23(b)(2) and cites no decision espousing its interpretation of the Rule.

Finally, Pella argues that the Seventh Circuit erred by affirming a Rule 23(b)(2) certification that occurred before the district court analyzed the laws

of the fifty states. But Pella is unable to identify a single decision requiring courts to undertake such analysis before (b)(2) certification. Instead, Pella exclusively cites opinions addressing (b)(3) certification, which has distinct criteria.

STATEMENT OF THE CASE

Respondents filed a consumer fraud class action against Pella, a manufacturer of aluminum-clad casement windows sold under the "ProLine" brand name. Respondents allege that Pella fraudulently concealed a known design defect that allows water to migrate behind the aluminum cladding into the wood of the window structure, causing wood rot that is normally undetectable by the consumer until a total failure of the windows, and reducing the windows' useful life to as few as three years. After Pella was deluged with complaints from its distributors—who had to replace the rotting windows of their customers and purchase those replacements from Pella at their own cost—it created a ProLine Customer Service Enhancement Program ("PSEP") to mitigate the replacement costs for distributors and to compensate those customers who repeatedly complained. Although Pella created the PSEP because of the design defect, Pella did not inform its customers about the existence of the defect or of the PSEP, and it did not inform prospective customers of the defect. Pet. App. 1a-2a, 46a-47a, 49a.

Proceedings Before the District Court

Plaintiffs brought suit, alleging that Pella committed consumer fraud by failing to inform customers about the design defect, its role in causing rot, and the PSEP. The parties agreed to conduct discovery in

two phases. Phase I focused on matters relating to class certification under Rule 23. If class certification were granted, Phase II would focus on the merits of respondents' claims. During Phase I discovery, Pella consistently resisted requests for documents that implicated causation, arguing that causation was a merits issue that was irrelevant to class certification. For instance, Pella objected to a discovery request for documents regarding "testing of aluminum clad windows to determine . . . potential causes of any wood deterioration" on the ground that "this is a classic merits issue of causation that does not reach numerosity, commonality, typicality, or adequacy of representation." Plaintiffs' Reply Memorandum in Opposition to Defendants' Response to Plaintiffs' Motion for Class Certification, 2-3. During a status conference, addressing respondents' attempts to obtain these documents, Pella likewise stated that "we do believe causation is a Phase II issue." *Id.*

At the conclusion of the first phase of discovery, respondents asked the district court to certify three nationwide classes: one for declaratory relief under Rule 23(b)(2), one for monetary relief under Rule 23(b)(3) on an unjust enrichment theory, and one for statutory consumer-fraud damages under Rule 23(b)(3). With respect to the proposed 23(b)(3) classes, respondents suggested, in the alternative, certification of subclasses comprising individual states. Pet. App. 51a, 74a.

The court certified the 23(b)(2) class, finding that respondents had alleged that Pella acted on grounds applicable to the class as a whole by "failing to disclose material facts about the defect, and by secretly creating and implementing the PSEP and by not applying it consistently." *Id.* at 71a. The court's order

allows the class to seek six declarations that establish Pella's concealment of a known design defect and secret modification of its warranty, and entitle every class member to disclosure of the defect, lifting of the time limit on Pella's warranty for wood-rot claims, notice of this change to the warranty, reassessment of any previous warranty claims based on wood rot that Pella had denied, free inspection for wood rot upon request, notice of this inspection program, and the right to have any warranty coverage dispute adjudicated by a special master. *Id.* at 48a-50a n.3. This class encompasses owners of ProLine windows that have not yet manifested the defect or have not yet been replaced. *Id.* at 83a-84a.

The court declined to certify a Rule 23(b)(3) class as to the unjust enrichment claim. The court explained that the typical remedy for unjust enrichment is restitution, measured not by the plaintiff's loss but by the value of the defendant's unjust gain and held that, in regard to this cause of action, individualized issues would dominate. *Id.* at 81a-82a.

By contrast, with regard to the proposed Rule 23(b)(3) consumer-fraud class, the court identified a set of common questions that predominated over individual questions, including:

- the scope of Pella's warranty;
- the nature of the PSEP and whether it amended the warranty;
- whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect;
- whether and when Pella knew of the defect; and

- whether and when Pella publicly announced the defect and the PSEP.

Id. at 74a. The court declined to certify a nationwide 23(b)(3) class, however, finding subclasses of individual states to be more appropriate. The court examined the consumer protection statutes of the states for which the plaintiffs requested subclasses and certified 23(b)(3) subclasses for California, Florida, Illinois, Michigan, New Jersey and New York, with each subclass comprising consumers whose windows suffered the defect and have been replaced. The court determined that the consumer-fraud statute of North Carolina involved different and subjective inquiries, thus making certification for that state inappropriate. *Id.* at 62a, 74a-78a.

Because of the predominance of common questions among respondents' consumer-fraud claims, and because "trying these claims separately would result in a substantial amount of repetition," the court found class proceedings to be the superior form of adjudication under Rule 23(b)(3). The court acknowledged that damages amounts and individual causation questions (such as whether a customer's wood rot resulted from the defect or another factor such as poor installation) would need to be addressed individually, but the court found this did not negate the predominance of common questions over individual questions. *Id.* at 74a, 79a, 80a. The court also held that "[d]ue to the predominance of other issues, differences in applicable statutes of limitations do not bar class certification under Rule 23(b)(3)." *Id.* at 79a.

Proceedings Before the Seventh Circuit

Pella requested interlocutory review under Rule 23(f). In a per curiam opinion, Judges Posner, Williams, and Tinder granted review and affirmed the district court. The court of appeals identified nothing noteworthy in the district court's order but stated that it had granted review to address Pella's argument "that consumer fraud cases as a general matter are not amenable to class treatment." Pet. App. 4a.

Affirming the district court's order, the Seventh Circuit emphasized that "consumer fraud class actions present problems that courts must carefully consider before granting certification," and explained that the district court had considered and addressed precisely these concerns. *Id.* at 4a, 5a. It noted, for instance, that "[t]he narrow way in which the district court defined the classes here eliminates concern" about overbreadth. *Id.* at 7a-8a. And it affirmed the district court's holding "that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." *Id.* at 6a. The court also found no credible objections to the district court's certification of a Rule 23(b)(2) class, because the declaratory relief sought by the (b)(2) class was integral to establishing class members' entitlement to equitable relief in the form of specific performance of Pella's warranty. *Id.* at 8a-9a.

The Seventh Circuit observed that in this action, where common questions predominate, "there is an economy to class treatment" of the questions to be adjudicated by the class, "the resolution of which has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs." *Id.* at 6a. It also noted that in contrast to some cases involving common issues among plaintiffs, here the accuracy of the resolution of those common issues is unlikely to be enhanced by repeated proceedings because the issues are not so complex, nor the consequences so great, "that a decentralized process of multiple trials is necessary for an accurate evaluation of the claims." *Id.*

Pella's request for rehearing or rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

I. The Decision Below Takes No Position on Whether "Issue" Classes May Be Certified Under Rule 23 Without Requiring Overall Predominance, and the Decision Is Consistent with Even the Most Restrictive Interpretation of the Rule.

A. The Seventh Circuit opinion is a narrow per curiam Rule 23(f) decision addressing the single issue of whether the Circuit had adopted a categorical prohibition on class certification of consumer fraud claims. The opinion, similar to many others, found that it had not.

Seeking to broaden the scope of the brief decision below, Pella invokes a dispute among the courts

about whether "issue" classes may be certified under Rule 23(c)(4) if the "predominance" requirement of (b)(3) has not been met. Pella claims that the Seventh Circuit has now weighed in on this dispute by affirming certification of an "issue" class without requiring that common questions predominate as to the cause of action as a whole. *See* Pet. 15-17. Pella's premise is inaccurate. The Seventh Circuit did not hold that "issue" classes may be certified without an overall finding of predominance; rather, it affirmed the district court's finding that predominance exists here. Pet. App. 6a. Pella's claims to the contrary turn on mischaracterizations of the decisions below. And the circuit conflict that Pella cites is thus immaterial because the decision below did not take a position on this conflict and is consistent with even the most restrictive interpretation of Rule 23(b)(3), adopted by the Fifth Circuit.

Pella states that the decision below "exacerbates a festering circuit conflict on the propriety of 'issue' classes," Pet. 19, with the Second and Ninth Circuits purportedly disagreeing with the Fifth Circuit. The cases Pella cites, however, all address whether courts may certify a class under Rule 23(c)(4) *notwithstanding* that the predominance requirement of Rule 23(b)(3) has not been satisfied. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007) ("Rule 23(c)(4)(A) is available to certify particular issues regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.") (internal quotation omitted); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 222 (2d Cir. 2006) ("Whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule

23(b)(3)'s predominance requirement is a matter of first impression in this Circuit."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.").

The question whether predominance must be satisfied for a (c)(4) issue class is not presented here because the district court, whether or not it was required to do so, found that predominance had been satisfied. Consistent with both approaches, the district court found, and the court of appeals agreed, that certification is proper because, among other things, common issues predominate:

> The district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the *central questions* in the litigation are the same for *all* class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty.

Pet. App. 6a (emphasis added). Nothing in the Seventh Circuit's per curiam opinion suggests that an issue class may be certified if the claim as a whole does not meet the (b)(3) standards.

The decision below thus does not merit review, because certification would be permitted here even under the Fifth Circuit's restrictive view that "issue classes" are available only when Rule 23(b) criteria are satisfied by the claim as a whole. The district court and Seventh Circuit expressly found that common questions predominate over individual questions in the action as a whole and that Rule 23(b)(3)'s requirements were met. *Id.* at 5a-6a, 73a-82a. The Seventh Circuit's decision thus does not implicate the disagreement identified by Pella.

B. Attempting to disprove this critical fact, Pella misrepresents key aspects of the district court and Seventh Circuit opinions. For example, Pella writes that "[w]ith respect to the Rule 23(b)(3) class, the court held that respondents satisfied the threshold 'commonality' requirement of Rule 23(a) based on the underlying question whether the Pella ProLine casement windows are defective." Pet. 8. While this statement suggests that the court identified only a single common issue (the existence of a design defect), the text cited by Pella reveals the breadth of the commonality finding:

> Plaintiffs maintain that common questions include the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood 'durability' defect, whether and when Pella knew of the defect, and whether and when Pella publicly

> announced the defect and the PSEP. These are questions that are common to the class, and are allegedly a result of Pella's standardized conduct toward the class members.

Pet. App. 58a-59a, *cited at* Pet. 8.

Similarly, Pella narrowly describes the scope of the Seventh Circuit opinion: "The Seventh Circuit affirmed certification of the Rule 23(b)(3) class on the ground that the issue of 'defect' predominated, even though any individual plaintiff would still have to prove causation." Pet. 12. But the Seventh Circuit recognized that the "defect" issue is only one of many questions common to the class that together predominate over individual questions: "[T]he central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." Pet. App. 6a.

This mischaracterization goes to the heart of Pella's argument: that the Seventh Circuit affirmed certification of an "issue" class without requiring predominance of common questions. *See* Pet. 16. The court of appeals did no such thing.

Elsewhere, Pella mischaracterizes the district court's analysis of Rule 23(b)(3) by stating that "[t]he court . . . declared that the commonality analysis of Rule 23(a) essentially satisfied the predominance requirement of Rule 23(b)(3)." Pet. 8. In support of this assertion, Pella cites the court's preliminary observation that "[c]onsiderable overlap exists between the court's determination of commonality and a finding

of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." Pet. App. 73a-74a. Pella, however, fails to mention that the district court followed this prosaic observation with eight pages of detailed analysis explaining why the predominance requirements of Rule 23(b)(3) are satisfied. *See id.* at 74a-82a. The court's opinion belies Pella's claim that the district court "bootstrapped" a finding of commonality under Rule 23(a) into a finding of predominance under Rule 23(b)(3), and that the Seventh Circuit "blessed that decision." Pet. 16.

In any event, Pella seeks review of the Seventh Circuit's decision, not the district court's. The Seventh Circuit's opinion nowhere suggests that a commonality determination under Rule 23(a) satisfies the Rule 23(b)(3) requirement that common issues predominate.

C. The district court defined the (b)(3) damages class to include only those customers "who have experienced a manifest defect and have paid to repair or replace th[o]se windows." Pet. App. 81a. As the Seventh Circuit stated, "the narrow way in which the district court defined the classes here eliminates the concern that definitions are overbroad or include a great many people who have suffered no injury." *Id.* at 7a-8a. Moreover, "here there is an economy to class treatment," which "has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs." *Id.* at 6a.

Nonetheless, Pella argues that Rule 23(b)(3) certification was inappropriate because individual plaintiffs will later need to show that the ProLine design defect caused the rot in their ProLine windows. *See* Pet. 17. Yet the use of subsequent individual proceedings is expressly contemplated in the Federal Rules. As the Advisory Committee Notes to Rule 23(b)(3) explain: "[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, *and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class*." Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes, 1966 Amendments. *See also* Pet. App. 7a (citing 5 William B. Rubenstein, Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 17.28, pp. 413-14 (4th ed. 2002)).

In apparent acknowledgement of this aspect of the Rules, Pella states that the plaintiffs will need to demonstrate that their own wood rot was caused by the inherent design defect that will have been shown to rot wood, and Pella posits a categorical rule that the need for individualized causation evidence automatically renders Rule 23(b)(3) certification inappropriate. Again, Pella contends that the Seventh Circuit's failure to adhere to this "rule" "deepened a circuit conflict." Pet. 17. The decisions on which Pella relies, however, neither espouse such a categorical rule nor provide evidence of any circuit discord.

For instance, the first case cited by Pella, *Newton v. Merrill Lynch*, 259 F.3d 154 (3d Cir. 2001), involved a private securities fraud claim under Rule 10b-5. The plaintiff investors alleged that the defendant broker-dealers violated their duty to execute trades under the most "favorable terms reasonably

available" by executing orders at a set price and failing to investigate other feasible alternatives that potentially offered better prices. The putative class included thousands of investors, and the alleged practice affected hundreds of millions of transactions. *Id.* at 162. For each of these hundreds of millions of transactions, the plaintiffs needed to demonstrate misrepresentation or omission of a material fact, scienter on the part of the defendant, reliance on the misrepresentation, and damage resulting from the misrepresentation. *Id.* at 173. In this context, the court found individual questions would predominate: "Examining millions of trades to ascertain whether or not there was injury [means] that individual issues overwhelm[] common questions among the class." *Id.* at 187.

Pella seizes on one sentence in *Newton*—"If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable," *id.* at 172—and contends that the Third Circuit adopted a categorical rule that would prevent certification here. *See* Pet. 17. But *Newton* simply represents a court applying Rule 23(b)(3) to the facts at hand. In *Newton*, the court determined that individual questions would "overwhelm" the common questions, and therefore *in that case* the "essential elements of the cause of action" could not be proven on a class-wide basis. Here, the Seventh Circuit applied 23(b)(3) to different facts and concluded that *in this case* the predominant elements *can* be proven as a class. *See* Pet. App. 5a (stating that the common and predominant questions identified by the district court were "the essence of the dispute" and were "better resolved by class treatment"). There is no interpretative disagreement between these two

opinions. The other decisions listed by Pella (without parenthetical explanation) are similarly unavailing. *See* Pet. 17.[1]

D. *Castano v. American Tobacco Co.*, on which Pella relies heavily, is likewise consistent with the Seventh Circuit's opinion. Pella states that, in *Castano*, the Fifth Circuit explained that "the predominance requirement ensures that commonality governs *a claim as a whole*." Pet. 17 (citing *Castano*, 84 F.3d at 745 n.21 ("[A] cause of action, as a whole, must satisfy Rule 23(b)(3)'s predominance requirement."). What Pella fails to state is that the footnote it cites is devoted entirely to discussing the relationship between Rules 23(c)(4) and 23(b)(3), and to explaining that courts may not use 23(c)(4) to certify classes if the requirements of 23(b)(3) are not met. This discussion does not address Pella's contention that certification is categorically impermissible if causation questions must be addressed individually. Moreover, here, both the Seventh Circuit and the district court expressly concluded that respondents' claims, as a whole, satisfy Rule 23(b)(3) because common questions predominate. Pet. App. 5a-6a, 73a-82a. The decisions are thus in harmony with *Castano*. *Cf. Gunnells v. Healthplan Serv., Inc.*, 348

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[1] Pella's Seventh Amendment argument (Pet. 18-19) was ably refuted by the decision below. *See* Pet. App. 9a-10a. One of the most prominent opinions raising Seventh Amendment concerns about bifurcated trials, *In re Rhone-Poulenc*, 51 F.3d 1293, 1302-03 (7th Cir.1995) (Posner, J.), was authored by a member of the per curiam panel here. The panel was aware of these concerns and concluded that, under the facts of this case, the district court was correct that individual juries would not be required to reexamine facts decided by the class jury.

F.3d 417, 444-45 (4th Cir. 2003) (court "ha[d] no need to enter th[e] fray" where "even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view").[2]

E. Finally, Pella's argument that class certification cannot be granted because of outstanding issues regarding causation is in stark contrast to the position it consistently maintained in the district court. There, as explained above (at 3-4), Pella rebuffed discovery requests for documents related to causation, stating repeatedly and on the record that causation was a merits issue not relevant to class certification. Pella should not now be permitted to claim that causation is central to class certification.

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[2] *Castano* involved "what may be the largest class action ever attempted in federal court," 84 F.3d at 737, in which the district court certified a class comprised of "all nicotine-dependent persons in the United States . . . who have purchased and smoked cigarettes manufactured by the defendants," along with their estates, representatives, administrators, spouses, children, relatives and "significant others" as heirs or survivors, with claims going back to 1943. *Id.* The Fifth Circuit reversed largely because the district court certified the class "[w]ithout any specific analysis regarding the multitude of issues that make up 'core liability.'" The district court "did not discuss why 'core liability' issues would be a significant, rather than just common, part of each individual trial, nor why the individual issues in the remaining categories did not predominate over the common 'core liability' issues." *Id.* at 739. The contrast to the present case is self-evident.

II. The Courts of Appeals Are Not in Conflict Regarding the "Finality" of Relief Under Rule 23(b)(2).

A. Pella's objection to certification of the Rule 23(b)(2) class "is essentially the same as the point made above with respect to Rule 23(b)(3)." Pet. 23. Pella asserts that because the declaratory relief will not entitle class members to window replacement without a further showing that the defect caused their particular wood rot, the relief is not "final." *Id.* As the Seventh Circuit explained, however, Pella misapprehends the nature of the (b)(2) relief being sought. Pet. App. 8a ("Pella mischaracterizes the effect of the six declarations contemplated by the district court."). The requested declarations would constitute final relief, applicable to the class as a whole. The declaratory relief would entitle every class member to disclosure of the window defect, lifting of the time limit on Pella's warranty for wood-rot claims, notice of this change to the warranty, reassessment of any previous warranty claims based on wood rot that Pella had denied, free inspection for wood rot upon request, notice of this inspection program, and the right to have any warranty coverage dispute adjudicated by a special master. *Id.* at 48a-50a. This relief is all that respondents seek for the Rule 23(b)(2) class.

Pella argues that such declaratory relief cannot be certified under (b)(2) because, after the class members obtain the declarations, Pella might dispute a class member's later request for window replacement pursuant to warranty by arguing that the class member's wood rot was caused by some other factor. This scenario, however, does not detract from the finality of the declaratory relief, which will not

guarantee new windows for every class member but will give them notice of the defect, free inspection to ascertain if they are affected, and coverage under Pella's warranty.[3] That Pella may later dispute an individual claim made under that warranty does not alter the finality of this relief.

Furthermore, that Pella's actions might not have caused every class member's wood rot (and thus that some customers seeking window replacement under warranty may need to show an absence of other contributing factors) does not make Rule 23(b)(2) certification improper: "Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes, 1966 Amendments; *see, e.g., DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1073 (1st Cir. 1978). Pella's concealment of a known defect applies to the entire class, regardless of whether some class members escape injury from this concealment.

B. Moreover, Pella fails to demonstrate any circuit disagreement regarding "finality" under Rule 23(b)(2) and does not identify a single decision adher-

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[3] The Seventh Circuit imprecisely stated that "the cumulative effect" of the six declarations "will be an entitlement to have their windows replaced," Pet. App. 9a, which Pella correctly notes is not accurate. The opinion's next two sentences, however, make its meaning clear: class members will be entitled to the benefits of the warranty that Pella denied them, as well as to notice and inspection. *Id.*

ing to its interpretation of the Rule. Instead, Pella cites opinions in which (b)(2) certification was denied and implies that it was denied because the plaintiffs sought non-final relief. *See* Pet. 23-24 ("Given the plain language of Rule 23(b)(2), it is hardly surprising that the First, Fifth, and Eleventh Circuits have expressly rejected the certification of 'issue' classes seeking non-final declaratory relief under Rule 23(b)(2)."). The opinions belie this implication.

For example, in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), plaintiffs sought certification for injunctive and declaratory relief under the Bankruptcy Code, the Fair Debt Collection Practices Act, the Truth in Lending Act ("TILA"), and the Racketeer Influenced and Corrupt Organizations Act. The court determined that even if these statutes authorize equitable relief, most of the class sought only damages, and the declaratory relief they requested would serve only to facilitate a damages award. Because the class would gain nothing from an injunction and Rule 23(b)(2) permits certification only for declaratory relief that "corresponds" to injunctive relief, the court found certification improper. *Id.* at 976-79 & n.39. The denial of certification was not based on the "finality" of the relief sought nor the propriety of "issue" classes.

Likewise, *Christ v. Beneficial Corp.*, 547 F.3d 1292 (11th Cir. 2008), involved plaintiffs seeking injunctive relief under TILA. The court determined that TILA does not authorize such relief, and therefore "[b]ecause injunctive relief is not a remedy available under TILA . . . Rule 23(b)(2) certification under TILA was improper." *Id.* at 1298. Quoting *Bolin*, the court stated that since the class members could not seek injunctive relief, a class could not be

certified for corresponding declaratory relief. *Id.* at 1298 n.11 (quoting *Bolin*, 231 F.3d at 978-79). The court denied certification for declaratory relief because the plaintiffs were entitled to *no injunctive relief at all*, not because the relief they sought was insufficiently "final." The opinion does not discuss "finality" of relief or "issue" classes at all.

McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007), also cited by Pella, did not even involve certification of a Rule 23(b)(2) class. The *McKenna* plaintiffs sought damages from their lender and rescission of their loan transactions under TILA. They also attempted to represent a class of plaintiffs seeking a "declaration that any class member who so desires may seek to rescind their transaction." *Id.* at 421. The district court certified the class under Rule 23(b)(3). *Id.* at 427. The First Circuit held that TILA rescission claims are not "maintainable in a class-action format." *Id.* at 423-26. Because a class could not seek rescission under TILA, it also could not seek a declaratory judgment entitling class members to rescission. *Id.* The court went on: "If more were needed—and we doubt that it is—the justifications for class treatment are significantly diminished when the remedy sought is a declaration of the right to rescind" because "absent class members would have the same right to seek rescission after a declaratory judgment was rendered as they had previously." *Id.* at 427. In other words, the declaratory judgment (besides being prohibited by the statute) would have no practical effect on the class members. Obviously such a class proceeding would not serve "judicial economy and efficiency," Pet. 24 (quoting *McKenna*, 475 F.3d at 427). This analysis has no bearing here, where the declaratory relief sought will

provide tangible relief to the members of the Rule 23(b)(2) class.

III. The Courts of Appeals Are Not in Conflict Regarding the Timing of State-Law Analysis Under Rule 23(b)(2).

A. Pella's final complaint is that the Seventh Circuit affirmed the district court's certification of a nationwide Rule 23(b)(2) class without first analyzing the laws of the fifty states. Pet. 25. Pella's argument is premature. Prior to certification, the district court indicated that any challenges to the substance of the requested declaratory relief would be addressed during the merits phase of the case. Dkt. 163 at 23. After the Seventh Circuit affirmed certification, Pella submitted to the district court a proposed schedule for briefing regarding the substantive law governing the declaratory judgment class. Defs.' Mot. to Set Pretrial Schedule for Issue Class Trial, 6-8. Thus, the question of what law governs the (b)(2) class and whether all class members are entitled to declaratory relief is now pending before the district court. The court might find no pertinent conflict among the states, identify subclasses, or even de-certify the (b)(2) class. Whatever the outcome, it serves no purpose for this Court to grant review now, when the district court is simultaneously reviewing the issue that Pella asks this Court to instruct that court to consider.

B. Although Pella argues that the Seventh Circuit erred in affirming Rule 23(b)(2) certification before the state-law analysis took place, Pella does not identify a single decision that holds to the contrary. Every case cited by Pella on this point addresses

state-law analysis in the context of (b)(3) certification, not (b)(2) certification.

Specifically, without exception, the passages that Pella cites comprise discussions of the "predominance" requirement of Rule 23(b)(3). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) ("Zinser argues that the district court abused its discretion by holding that variances in state laws overwhelm common issues of fact. . . . Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law."); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996) (reversing (b)(3) certification on manageability grounds because plaintiffs challenged "hundreds of widely differing 900-number programs" under the laws of fifty jurisdictions); *Castano*, 84 F.3d at 740, 741 (holding that the district court erred because "it failed to consider how variations in state law affect predominance and superiority," and noting that "variations in state law may swamp any common issues and defeat predominance"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("Given the absence of evidence that common issues predominate, certification was improper. . . . The district judge also failed to consider how the law of negligence differs from jurisdiction to jurisdiction."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("[W]e next state our reasons for instructing the District Court to reconsider the finding that common legal questions predominate in each class certified."); *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (affirming certification of 23(b)(3) class for claims involving "the substantive law of many states," noting that "plaintiffs have under-

taken an extensive analysis of the variances in products liability among the jurisdictions" and that "plaintiffs have made a creditable showing . . . that class certification does not present insuperable obstacles").[4]

Pella quotes part of a sentence in *Walsh* by then-Judge Ginsburg to support its interpretation of (b)(2). *See* Pet. 26. It omits, however, the first part of the sentence, along with the previous sentence, which reveal that the court's discussion was directed to the predominance requirement of Rule 23(b)(3): "A considered *predomination* determination by the District Court, however, must be made. As the Third Circuit observed in *In re Asbestos School Litigation*, to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Walsh*, 807 F.2d at 1016 (emphasis added) (citations omitted). In this case, the plaintiffs offered just such an analysis for their Rule 23(b)(3) damages claims, and the district court made precisely this type of considered determination, as the Seventh Circuit noted in affirming the decision. Pet. App. 10a.

The consensus that state-law variations are important considerations in (b)(3) class certification de-

---

[4] Although *In re Asbestos School Litigation* involved a (b)(2) question as well as a (b)(3) question, the court briskly affirmed denial of a 23(b)(2) class on the ground that the class actually sought damages, not injunctive relief. *Id.* at 1008. The discussion of state-law variations, which Pella cites, occurs in a separate discussion in which the court affirmed certification of a Rule 23(b)(3) class. *Id.* at 1010.

cisions is consistent with the decision below. Indeed, the Seventh Circuit's own cases concur on this point, debunking Pella's claim of disagreement. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745-46 (7th Cir. 2008) (Posner, J.); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.).

Furthermore, (b)(2) and (b)(3) establish distinct criteria for certification. Subdivision (b)(3) applies to situations in which "class-action treatment is not as clearly called for as in those described above [under (b)(1) and (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts." Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes, 1966 Amendments. While (b)(2) may require a certain threshold of cohesiveness, because (b)(3) turns more heavily on convenience and desirability, it entails a special focus on the promotion of efficiency: "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* Manageability concerns related to variations in state law are also heightened in (b)(3) actions because these actions involve damages claims in which courts are required to instruct juries on the relevant law, potentially including subtle distinctions among the laws of numerous jurisdictions. *See Thorogood*, 547 F.3d at 746. No such concern is implicated in (b)(2) actions seeking equitable relief because the relief is crafted by a professional jurist capable of managing such legal distinctions. Thus, while variations in state law must be

analyzed in (b)(2) actions to determine whether the plaintiffs are entitled to the relief they seek, this inquiry need not be made at the certification stage in all cases.

CONCLUSION

There is a reason that the Seventh Circuit found this case to be a straightforward one, capable of resolution in a per curiam opinion. Affirming the district court did not require the Seventh Circuit to adopt any positions in tension with those of other circuits or this Court. The order affirmed by the Seventh Circuit was a context-specific determination that Rule 23's requirements were satisfied by the facts of this case. Pella seeks error correction of this fact-bound determination under the guise of resolving a circuit conflict. Examination of the pertinent decisions, however, reveals neither conflict nor error.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PELIA CORPORATION AND
PELIA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA,
AND WILLIAM AND NANCY EHORN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Plaintiffs' brief in opposition characterizes the decision below as an "unremarkable" and "straightforward" application of Rule 23 that is not "in tension with [the positions] of other circuits or this Court." Opp. 1, 26. That characterization is incorrect. The decision below firmly takes sides on a question that lies at the heart of modern class-action litigation and has divided the courts of appeals: may a court certify a class to litigate discrete issues that will not establish liability for any claim, or does the presence of individualized liability issues preclude class certification? As underscored by Pella's *amici* (whom plaintiffs ignore), the decision below erroneously ratifies the certification of "issue" classes that will not establish liability for any claim, thereby substantially diluting the requirements of Rule 23, with far-reaching implications for not only courts and litigants, but the economy as a whole. *See* Br. of National Ass'n of Home Builders (NAHB) *et al.*, at 5, 10-13; *see also* Br. of DRI-The Voice of the Defense Bar, at 5-6, 8-10; Br. of Product Liability Advisory Council, Inc., at 3-5, 16-19.

ARGUMENT

I. "Issue" Classes Under Rule 23(b)(3)

Plaintiffs first argue that the decision below "does not implicate" the acknowledged circuit conflict over the propriety of certifying "issue" classes under Rule 23(b)(3). Opp. 11. According to plaintiffs, that conflict does not involve Rule 23(b)(3) at all, but instead Rule 23(c)(4). *See* Opp. 9-11. Plaintiffs are mistaken.

It is axiomatic that "[i]n addition to meeting the four conjunctive requirements of 23(a), a class action must also qualify under one of the three subdivisions of 23(b)." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). Thus, there can be no such thing as "a (c)(4) issue class," Opp. 10, that does not satisfy one of the three subdivisions of Rule 23(b). And a class certified under Rule 23(b)(3) must always satisfy that provision's "predominance" and "superiority" requirements.

This case squarely presents the question whether a court may certify an "issue" class under Rule 23(b)(3) where (as here) liability cannot be established on a classwide basis. That is the very question on which the Second and Ninth Circuits, on the one hand, and the Fifth Circuit, on the other, are divided. *See* Pet. 20-21 (citing, *inter alia*, *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 745 (5th Cir. 1996)).

Like the decision below, the Second and Ninth Circuits hold that a court may certify a class under Rule 23(b)(3) to resolve discrete issues even where a determination of liability would necessarily require individualized adjudication. *See, e.g.*, *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108-09 (2d Cir. 2007); *Strip Search*, 461 F.3d at 226-27; *Valentino*, 97 F.3d at 1234. The Fifth Circuit, in contrast, holds that a court may not certify a class under Rule 23(b)(3) to resolve discrete issues where a determination of liability would require individualized adjudication. *See, e.g.*, *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598,

601 (5th Cir. 2006); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998); *Castano*, 84 F.3d at 745 n.21. As explained in the petition, this open and notorious circuit conflict has long cast a pall of uncertainty over class-action litigation. *See* Pet. 21 (citing, *inter alia*, *Hohider v. UPS, Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008)).

In support of their view that the "predominance" and "superiority" requirements of Rule 23(b)(3) allow certification of "issue" classes that do not establish liability for any claim, the Second and Ninth Circuits have invoked Rule 23(c)(4), which specifies that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). According to these courts, Rule 23(c)(4) shows that the "predominance" and "superiority" requirements of Rule 23(b)(3) allow certification of "'particular issues'" even when "'the action as a whole'" cannot be adjudicated on a classwide basis. *Strip Search*, 461 F.3d at 225-26 (quoting *Valentino*, 97 F.3d at 1234). The Fifth Circuit squarely rejects this approach: "a cause of action, *as a whole*, must satisfy the predominance requirement of (b)(3)," and "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano*, 84 F.3d at 745 n.21 (emphasis added); *see also Steering Comm.*, 461 F.3d at 601; *Allison*, 151 F.3d at 422.

Plaintiffs err by asserting that the dispute in these cases involves "whether 'issue' classes may be certified *under Rule 23(c)(4)* if the 'predominance' requirement of (b)(3) has not been met." Opp. 9 (emphasis added); *see also id.* (asserting that the

dispute in these cases involves "whether courts may certify a class *under Rule 23(c)(4)* notwithstanding that the predominance requirement of Rule 23(b)(3) has not been satisfied.") (emphasis modified). Rule 23(c) —in sharp contrast to Rule 23(a) and (b)— does not establish any certification requirements, but instead addresses logistical issues regarding certified classes. That is why, as noted above, there is no such thing as a Rule 23(c)(4) class that does not satisfy Rule 23(b), and a court cannot certify a class under Rule 23(b)(3) that does not satisfy the predominance and superiority requirements. Accordingly, the issue in all these cases is whether courts can certify "issue" classes under Rule 23(b)(3) where, as here, plaintiffs concededly cannot establish liability on a classwide basis. The fact that the Seventh Circuit broadly held that Rule 23(b)(3) gives a court "the discretion to split a case by certifying a class for some issues, but not others," Pet. App. 7a, without even invoking Rule 23(c)(4) does not negate the conflict. To the contrary, it underscores that the Seventh Circuit interprets the "predominance" and "superiority" requirements of Rule 23(b)(3) so loosely that it did not even bother to invoke Rule 23(c)(4) to buttress its interpretation.

Plaintiffs thus beg the question by insisting that "[t]he district court and Seventh Circuit expressly found that common questions predominate over individual questions in the action as a whole." Opp. 11. The very question here is whether courts *can* find "that common questions predominate over individual questions in the action as a whole," *id.*, where individual proceedings would still be necessary to establish liability for any claim.

As explained in the petition, at least four courts of appeals have held that Rule 23(b)(3) does not allow class certification under these circumstances. *See* Pet. 17-18 (citing, *inter alia*, *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393-94 (5th Cir. 2007) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish reliance); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005) (same); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362-63 (4th Cir. 2004) (same); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003) (same); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish injury); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-90 (3d Cir. 2001) (same); *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 326-27 (5th Cir. 2008) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish consent); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish equities)); *see also St. Jude*, 522 F.3d at 840 ("The need for ... plaintiff-by-plaintiff determinations [into causation and reliance] means that common issues will not predominate the inquiry into [the defendant's] liability."); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43 (6th ed. 2010) ("[I]ssue certification is not appropriate where the determination of liability itself requires an individualized inquiry."); *id.* § 5:23 ("Judicial economy is not served by class litigation ... unless the evidence used to establish liability as to the

claims of the representative plaintiffs would also establish liability as to the claims of every absent class member.").

Indeed, as noted by *amici* National Ass'n of Home Builders *et al.*, this case is materially indistinguishable from *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001). *See* NAHB Br. 10-11. There, as here, the plaintiff alleged that a home building component (there, stucco siding) was defective and that the manufacturer had failed to warn purchasers of the defect. *See* 255 F.3d at 141. There, however, the Fourth Circuit held that the district court erred by certifying a class under Rule 23(b)(3), because the inherently individualized causation issues necessarily precluded a determination of predominance. *See id.* at 147-49. "If ... an individualized inquiry [into causation] is needed to determine the membership of a workable class, it is clear that common issues do not predominate over individual issues as required by Rule 23(b)(3)." *Id.* at 149; *see also McLaughlin on Class Actions* § 4:43 ("In product liability actions, most courts have rejected attempts to certify the issue of a defendant's general or overall liability to a class. The intractable problem is that regardless of whether general liability ... is established, the defendant is entitled to present evidence rebutting the existence or cause of any particular claimants' alleged injuries, thereby dissipating any economies achieved through class-wide adjudication.").

Plaintiffs make no real attempt to distinguish any of the foregoing cases, other than to insist that they merely "appl[ied] Rule 23(b)(3) to the facts at hand." Opp. 15. But even cursory review of the cases shows

that they stand for the legal principle that "'[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Newton*, 259 F.3d at 172); *see also Castano*, 84 F.3d at 745 (class action in which reliance must be established in individual proceedings "fail[s] the predominance requirement of rule 23(b)(3)"). In light of these cases, plaintiffs' assertion that "Pella identifies no opinion from any court" that follows this approach, Opp. 2, is inexplicable.

Similarly inexplicable is plaintiffs' assertion that the Rule 23(b)(3) "issue" class certified here would pass muster "even under the Fifth Circuit's restrictive view" of that Rule. Opp. 11. As noted above, the Fifth Circuit has held that the predominance and superiority requirements of Rule 23(b)(3) cannot be satisfied where, as here, individualized proceedings are necessary to establish an essential element of liability, like reliance, injury, or causation. *See Steering Comm.*, 461 F.3d at 601; *Allison*, 151 F.3d at 421-22; *Castano*, 84 F.3d at 745 & n.21.

Plaintiffs also err by asserting that "the use of subsequent individual proceedings" after classwide adjudication of discrete liability issues "is expressly contemplated in the Federal Rules." Opp. 14. Tellingly, they cite no Federal Rule in support of that assertion. Instead, they cite an Advisory Committee Note observing that Rule 23(b)(3) certification may be warranted to determine classwide liability "despite the need, *if liability is found*, for separate determination of the *damages* suffered by individuals

within the class." Opp. 14 (emphasis modified; internal quotation omitted). If anything, that observation cuts against plaintiffs; it assumes that *liability* must be determined on a classwide basis, with subsequent individual proceedings limited to *damages*. The problem here is not that the class certification order severs liability from damages, but that it severs elements of liability from each other. That is not carving at the joint, which is why the decision below "raises serious Seventh Amendment problems," Pet. 18, that plaintiffs make no real effort to address, *see* Opp. 16 n.1.

Finally, plaintiffs assert that "Pella's argument that class certification cannot be granted because of outstanding issues regarding causation is in stark contrast to the position it consistently maintained in the district court." Opp. 17; *see also id.* at 3-4. That assertion is false. Pella consistently argued below that the need for individualized inquiry into causation precludes class certification, although a determination of causation in any specific case is a merits question. Indeed, both the district court and the Seventh Circuit not only acknowledged this argument, but *agreed* with Pella that the causation inquiry would require individualized adjudication. *See* Pet. App. 7a, 80a, 81a n.13. Plaintiffs need not agree with Pella's argument, but cannot deny that Pella made it.

II. "Issue" Classes Under Rule 23(b)(2)

Plaintiffs next argue that the Seventh Circuit properly upheld certification of a non-opt-out class seeking declaratory relief under Rule 23(b)(2) because the requested declarations provide them

with "final" relief. Opp. 18-22. Again, plaintiffs are mistaken.

The declarations requested here do not "correspond[]" to "final" injunctive relief, Fed. R. Civ. P. 23(b)(2), for the simple reason that they cannot be granted without first finding Pella liable, and plaintiffs concede that Pella's liability cannot be established on a classwide basis. Indeed, the district court stressed that the declarations "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." Pet. App. 73a. Accordingly, there is not merely a "possibility" of further proceedings if any plaintiff wants final relief, Opp. 2; there is a *certainty* of such proceedings.

Plaintiffs insist, however, that the declarations *themselves* are "final" relief—"[t]his relief is all that [plaintiffs] seek for the Rule 23(b)(2) class." Opp. 18. But this circular argument reads the requirement of "finality" out of the Rule. If a request for declaratory relief were always a request for final relief, a court could always certify a class to pursue a declaration on any discrete issue, such as whether the defendant breached a legal duty. In sharp contrast to the Seventh Circuit, other circuits have rejected that expansive interpretation of Rule 23(b)(2).

Thus, as explained in the petition, the Fifth and Eleventh Circuits have squarely held that certification under Rule 23(b)(2) is inappropriate where, as here, class proceedings would not establish liability for any claim without further individualized proceedings. *See* Pet. 24 (citing, *inter alia*, *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330,

1344-45 (11th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978-79 (5th Cir. 2000)). Plaintiffs try to distinguish these cases on the ground that the Rule 23(b)(2) classes proposed there "would gain nothing" from the requested declarations. Opp. 20. But the same is true here: the requested declarations do not establish liability, and by definition plaintiffs are entitled to *no* relief (declaratory or otherwise) before establishing liability. A declaration regarding a discrete issue is not, by itself, "final" relief. Where, as here, the declaration does not establish liability for any claim, it does not "correspond[]" to "final" injunctive relief, and hence cannot justify certification under Rule 23(b)(2).

III. Analysis of State Law Under Rule 23(b)(2)

Plaintiffs finally argue that the Seventh Circuit properly upheld certification of a nationwide class under Rule 23(b)(2) to pursue state-law claims without any analysis of the underlying state laws. According to plaintiffs, such an analysis is a predicate to certification of a nationwide class under Rule 23(b)(3), but not Rule 23(b)(2). *See* Opp. 22-26.

That distinction has no basis in law or logic. As explained in the petition, Rule 23(b)(2) requires a court to determine, as a prerequisite for certification, that "declaratory relief is appropriate respecting the class *as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). Needless to say, a court cannot determine that relief is appropriate respecting a nationwide class "as a whole" without any analysis of potential differences among governing state laws. Plaintiffs' argument that such analysis is "premature" at the class certification stage, and can be "addressed during the merits phase of the case," Opp. 22, turns

the law upside down: a court cannot certify a class first and ensure compliance with Rule 23 later. Indeed, the 2003 amendments to Rule 23 abolished "conditional" certification to underscore just this point. *See Hydrogen Peroxide*, 552 F.3d at 319 & n.21.

* * *

A final word is in order regarding this Court's recent grant of certiorari in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 2010 WL 3358931 (Dec. 6, 2010) (No. 10-277). The issues presented there are complementary to the issues presented here. As courts have explained, "Rule 23(b)(2) contains two requirements: (1) behavior generally applicable to the class as a whole; (2) injunctive relief predominates over damages sought." *Bolin*, 231 F.3d at 975. *Wal-Mart* focuses on the latter requirement; this case focuses on the former. To be sure, this Court directed the parties in *Wal-Mart* to brief the additional question whether the class certified there comports with the threshold requirements of Rule 23(a), which implicates the propriety of every class action. *Wal-Mart* does not, however, offer this Court a vehicle to resolve the recurring and far-reaching questions presented here about the certification of "issue" classes under Rules 23(b)(2) and (b)(3), or the certification of a nationwide class to pursue state-law claims without any analysis of the underlying state laws. Indeed, *Wal-Mart* does not present any issue regarding class certification under Rule 23(b)(3)—the only provision allowing certification of claims focused on obtaining monetary damages—at all.

Because this case presents important and recurring issues of class action law that dovetail

perfectly with the issues presented in *Wal-Mart*, this Court should grant this petition too, and use the pair of cases to provide much-needed guidance on the standards for class certification under Rule 23. At the very least, however, this Court should hold this petition pending the resolution of *Wal-Mart*, and revisit the issues presented here at that time.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant a writ of certiorari.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation.[1] DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, more efficient and—when national issues are involved—more consistent. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, the clients they represent, and to the judicial system as a whole.

This case is of critical importance to DRI and its clientele—businesses that are frequently targeted by class-action lawyers seeking a deep-pocket defendant. The courts below approved the use of "imaginative solutions" to the "problems" of class claims for damages that flunk the requirements imposed by

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The parties were notified of the intention to file this brief at least ten days prior to its due date, and written consents of the parties to the filing of this brief have been or are being filed with the clerk along with this brief.

Federal Rule of Civil Procedure 23(b)(3). Pet. App. 10a. Specifically, the district court overlooked the plaintiffs' inability to show that common issues in the case as a whole predominate over individual ones, as Rule 23(b)(3) mandates, instead certifying certain common issues and severing the multitude of individual issues—including causation, the applicability of the statute of limitations, and damages—for subsequent individual proceedings on the claims for monetary damages. Although not citing the rule, the district court certified an "issue class" under Rule 23(c)(4). In addition, invoking Rule 23(b)(2), the court certified class claims seeking declarations as to the set of common issues. Thus, the plaintiffs obtained class certification even though deciding the class claims will not achieve a final resolution of even a single class member's case.

The "imaginative" approach to class certification endorsed by the courts below, however, is not only contrary to Rule 23, but also effectively permits class certification on demand for the plaintiffs' bar. That in turn allows opportunistic plaintiffs to obtain blackmail settlements from businesses, inspiring new rounds of unfair and wasteful class-action litigation. The escalating demands by—and increasing success of—the plaintiffs' bar in obtaining certification of "issue classes" under Rules 23(b)(2), (b)(3), and (c)(4) have led to vexatious litigation. DRI accordingly has a strong interest in encouraging this Court to review and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just over a decade ago, this Court twice reminded the bar and lower courts that the stringent

standard that Rule 23(b)(3) imposes on class certification for damages claims are necessary to protect the due process rights of defendants and absent class members. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845–848 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622–623 (1997). This Court emphasized that Rule 23(b)(3)'s protections cannot be bypassed, whether through the device of a "settlement-only class" or by attempting to repackage the class action as one under Rule 23(b)(1)(B) for distribution of a limited fund. See *Ortiz*, 527 U.S. at 845 (warning "against adventurous application of Rule 23(b)(1)(B)" to skirt Rule 23(b)(3)'s requirements); *Amchem*, 521 U.S. at 622–625 (same in settlement class context).

Shortly thereafter, a different tactic to evade Rule 23(b)(3)'s requirement surfaced—the use of "issue classes." See, *e.g.*, Elizabeth J. Cabraser *et al.*, *New Issues and Key Rulings in the Certification, Trial, Settlement, and Appeal of Class Actions* 16 (ABA CCLE Nat'l Inst. Oct. 19, 2001) (arguing that the issue class action "seems poised for a renaissance"). Plaintiffs typically invoke Rule 23(c)(4), which provides for the certification of a "class action with respect to particular issues," or Rule 23(b)(2), which authorizes the certification of a class action seeking "final * * * declaratory relief." The proper relationship between Rule 23(b)(3) on the one hand and Rules 23(c)(4) and 23(b)(2) on the other is among the most significant and disputed questions pertaining to class actions today, with the fate of huge lawsuits hanging in the balance Now is the time for this Court to resolve these pressing issues, and this is the case in which to do it.

The first question is whether discrete common elements of a class claim for money damages may be certified as an "issue class" under Rules 23(b)(3) and (c)(4) in order to avoid having to satisfy the predominance requirement of Rule 23(b)(3) as to the entire claim. As petitioners have demonstrated, the Third, Fifth, and Eleventh Circuits have rejected this end-run around Rule 23(b)(3). *See* Pet. 17–18 (citing, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1023–1024 (11th Cir. 1996); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). By contrast, although in this case the Seventh Circuit did not expressly cite Rule 23(c)(4), that court has now joined the Second and Ninth Circuits in allowing the certification of "issue classes." See Pet. App. 6a–8a; *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Commentators are divided as well.[2]

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[2] Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 712 (2003) (arguing that "neither [Rule 23](c)(4)(A)'s text, its structural placement, nor its rule-making history provide support for an adventurous interpretation of the provision," and concluding that the Rule "simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement") with Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 263, 281 (arguing that issue certification "can fundamentally revamp the nature of class actions," and criticizing courts for "fail[ing] to grasp" the full meaning of Rule 23(c)(4)(A), which allows resolution of common issues while permitting complicated individual issues to be "severed away cleanly and painlessly").

The second issue is whether plaintiffs may alternatively obtain certification of a class under Rule 23(b)(2) by seeking declaratory relief as to particular common elements of the claim for damages. As petitioners have shown, the decision below is contrary to decisions of the First, Fifth, and Eleventh Circuits rejecting the certification under Rule 23(b)(2) of issue classes seeking such non-final declaratory relief. See Pet. 24 (citing *Christ* v. *Beneficial Corp.*, 547 F.3d 1292, 1298 & n.11 (11th Cir. 2008); *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 426–427 (1st Cir. 2007); *Bolin* v. *Sears Roebuck & Co.*, 231 F.3d 970, 977–979 (5th Cir. 2000)).

In the experience of DRI and its members, the confusion in the district courts on these seemingly basic questions of class-certification procedure is even more pronounced, with results all over the map. The need to resolve this disarray is reason enough to grant the petition for certiorari. But the sheer importance of the questions presented by the petition is itself ample reason to grant review—and reverse—the decision below. This brief provides additional context for understanding why issue class certifications such as the ones in this case are inefficient and profoundly unfair to defendants.

To begin with, the certification of an issue class action is almost trivially easy. All that would-be class counsel needs to do is identify a single issue of law or fact that is common to the class—a standard that virtually every putative class action can satisfy. The normal safeguard against improper certification of a class seeking monetary damages is the predominance requirement, which operates to ensure that the proposed class is sufficiently cohesive to warrant certification. But by definition that requirement is

satisfied in an issue class action, as all individualized issues have been severed and rendered irrelevant. See Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 281 (noting that issue classes allow individualized issues to be "severed away cleanly and painlessly"). Or the predominance requirement is simply avoided altogether by repackaging the class action as one under Rule 23(b)(2)—for which predominance is not required—that seeks non-final declarations as to the cherry-picked common elements of the claim.

The chief consequence of this drastic lowering of class certification requirements will be to open the floodgates to a deluge of issue class actions that were filed simply to extort a settlement from the defendant. Because of the exponentially larger stakes of a class action and the huge expense of defending such a suit, class certification places tremendous pressure on defendants to settle even meritless claims.

Converting these lawsuits into issue class actions causes them to pose an even greater threat to defendants. First, the fact that the class members stand to gain no money from the suit greatly reduces their incentive to monitor class counsel—which means that these actions are particularly susceptible to being lawyer-driven. Second, the defendant in an issue class action loses one of the traditional safeguards of traditional class-action litigation: the assurance of finality. Because issue class actions are certified by side-stepping the predominance requirement of Rule 23(b)(3)—and also by depriving absent class members of their notice and opt-out rights if Rule 23(b)(2) provides the vehicle for the issue class—any class judgment or settlement may be vulnerable to a colla-

teral challenge by absent class members. In order to prevent a tidal wave of shake-down class actions, this Court should grant review and reverse the decision below.

ARGUMENT

A. Under The Interpretation Of Rule 23 Adopted Below, Virtually All Class Actions Would Be Certifiable.

One consequence of the lower courts' rulings is clear: Under their reasoning, just about every request to certify a class action seeking monetary damages would be granted, at least in part.

Normally, such a request could be granted only if the putative class representative could demonstrate that, among other things, "the questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23 (b)(3). Numerous courts—including this Court—have agreed that the predominance requirement is a "demanding" one that ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; see also, *e.g.*, *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 (11th Cir. 2009) (predominance requires "an independent and substantial" and "rigorous[] analysis"); *Steering Comm.* v. *Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) ("predominance inquiry" is "rigorous"); *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (predominance requirement is "stringent"); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir. 2001) (same). One treatise writer advises that the predominance requirement "usually is the greatest obstacle to [Rule 23](b)(3) certifica-

tion" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (6th ed. Supp. 2009).

That obstacle is shunted aside, however, when the plaintiff seeks certification of an "issue" class. Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues" that are common to the class. Yet identifying a common issue of fact or law is a requirement that is "easily met in most cases." 1 WILLIAM B. RUBENSTEIN *ET AL.*, NEWBERG ON CLASS ACTIONS § 3:10 (4th ed. Supp. 2010).[3] If a class action for monetary damages can be certified under Rules 23(b)(3) and (c)(4) by cherry-picking one or more common questions, even though individual questions predominate for the case as a whole, then certification would become automatic: A court could "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano*, 84 F.3d at 745 n.21; 2 WILLIAM B. RUBENSTEIN *ET AL.*, NEWBERG ON CLASS ACTIONS § 4:23 (4th ed. Supp. 2010) ("[T]he court's discretion" to limit "a class action to designated common issues * * * has the capability of automatically satisfying the predominance test under Rule 23(b)(3)."); 7A CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. Supp. 2010) (Rule

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[3] *See also, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (the "requirement of commonality is a low bar"); 7A CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. Supp. 2010) ("[C]ommon questions have been found to exist in a wide range of contexts" because courts "have given [the commonality requirement] a permissive application.") (footnote omitted).

23(c)(4) may allow a court to "recast" non-predominating class actions into ones that "'predominate' for purposes of Rule 23(b)(3).").

In addition, the use of an issue class allows even serious concerns with the adequacy and typicality of a proposed class representative—which normally would halt class certification in its tracks—to be brushed aside. If the inquiry into the representative's adequacy and typicality is artificially confined to the common issues that the class counsel have artfully pleaded, then those requirements fall away as meaningful restrictions to class certification on demand. Thorny conflicts between the interests of the class representative and absent class members or between groups of class members can be ignored as irrelevant to resolution of a particular common issue. And particularized defenses to the class representative's claims—which otherwise would defeat typicality—can be assumed away.[4] The end result is automatic class certification in every case in which class counsel can identify even a single common issue.

The same is true if class counsel may repackage a class action for monetary damages as an "issue" class seeking declaratory relief as to any common element of a class claim. Rule 23(b)(2) authorizes

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[4] In addition, certification of an issue class action raises serious concerns about the manageability of class-wide proceedings. The courts below reasoned that severing the individualized issues rendered the remaining aspects of the case manageable for trial. See Pet. App. 10a, 83a. But when the individual proceedings would be centralized before a single decisionmaker—here the courts proposed to appoint a "Special Master" to resolve certain-to-follow disputes in every individual case (*id.* at 9a)—the question of manageability has simply been kicked down the road.

class certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final* injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added).[5] If plaintiffs may obtain certification under this Rule merely by requesting declarations on a limited subset of disputed issues of law or fact—as the courts below in effect held[6]—then the class counsel's ability to articulate a single common question for which declaratory relief may be sought is the only limit on class certification.

B. Freewheeling Certification Of "Issue Classes" Invites A Flood Of Vexatious Litigation.

In construing Rule 23 to allow the certification of "issue classes" virtually at will, the courts below

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[5] Numerous courts have recognized that declaratory relief under Rule 23(b)(2) must correspond to a *final* injunction rather than—as here—a step along the way to an award of damages. See, *e.g.*, *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); see also 7AA CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1775 (3d ed. Supp. 2010) ("[A]n action seeking a declaration concerning [the] defendant's conduct that appears designed simply to lay the basis for a damage award rather than injunctive relief would not qualify under Rule 23(b)(2).").

[6] To be sure, the court of appeals described "the cumulative effect" of the requested declarations as "an entitlement" for class members "to have their windows replaced" by the defendant. Pet. App. 9a. But the court elsewhere acknowledged that the class proceedings would not resolve the individualized causation and statute-of-limitations issues, which would be reserved for individual trials. *Id.* at 7a.

have invited a significant upswing in the opportunistic filing of shake-down class-action lawsuits against deep-pocket defendants. The outcome will have far-reaching and dire consequences for businesses; their owners, customers, and employees; and the judicial system as a whole.

1. The defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). As this Court has observed, because of the sheer stakes of a class action once it has been certified, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial * * *." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *Castano*, 84 F.3d at 746 (because "[c]lass certification magnifies and strengthens the number of unmeritorious claims," it "creates insurmountable pressure on defendants" to agree to "settlements [that] have been referred to as judicial blackmail"); *Rutstein* v. *Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) ("[T]he blackmail value of a class certification * * * can aid the plaintiffs in coercing the defendant into a settlement"); FED. R. CIV. P. 23(f), 1998 advisory committee's note ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). And the threat of inevitably costly and disruptive class-

wide discovery adds an additional "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741. Indeed, even frivolous lawsuits are often settled, simply because they generally are "as costly to litigate as legitimate claims." *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000).

Thus, it is unsurprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. See, *e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291–1292 (2002) ("[W]hat most class action lawyers know to be true" is that "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision."); Michael E. Solimine & Christopher O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk * * * of crushing liability from an adverse judgment on the merits is widely recognized.").

For example, one study of securities class actions concluded that the underlying merits have very little effect on whether and for how much a defendant settles; rather, the chief determinants are the size of the decline in the defendant's stock price and the amount of the defendant's insurance coverage. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–519 (1991); see also, *e.g.*, Thomas Willging

et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 179 tbls. 39–40 (Fed. Judicial Ctr. 1996) (even excluding class actions that were certified solely for settlement purposes, only three of 93 certified class actions reached trial, with the vast majority terminating in a settlement or a stipulated dismissal), available at http://ftp.resource.org/courts.gov/fjc/rule23.pdf.[7]

2. The ability to obtain virtually automatic certification of an issue class will exacerbate the problem of blackmail settlements drastically. Every lawsuit against a business could be converted into an abusive class action whenever the would-be class counsel can point to but a handful of common issues. And because class members would not be able to establish liability as a consequence of the proceeding, they would have inadequate incentives to monitor the conduct of the litigation. Commentators have long

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[7] As many commentators have recognized, the prevalence of blackmail settlements has tainted the reputation of class-action litigation. See, *e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371–372 (2000) ("Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

warned of the risk for abuse of the class-action mechanism when class members exercise insufficient oversight of class counsel.[8] Indeed, the high incidence of lawyer-driven class actions in the securities context spurred Congress to enact the Private Securities Litigation Reform Act of 1995, PUB. L. NO. 104-67, 109 STAT. 737 (1995). See H.R. CONF. REP. NO. 104-369, at 32 (1995). That problem will become omnipresent. Moreover, the ease of obtaining blackmail settlements will lead to a flood of additional issue class actions.

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[8] See, *e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–83 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991) ("[T]he single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients * * * operate largely according to their own self-interest * * *."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–883 (1987) ("High agency costs" inherent in class-action litigation "permit opportunistic behavior by attorneys" and, "[a]s a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client."); cf. Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html (noting that former securities class action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients").

In addition, certification of an "issue class" may condemn the defendant to having to defend an unwinnable lawsuit. If the class prevails on the common elements of its claims, the defendant faces potentially enormous liability to the class in subsequent proceedings. But if the defendant wins on the certified issues—or even if the defendant reaches a class settlement—it has no assurance of finality because absent class members may argue that they are not bound by the class settlement or adverse judgment. Some courts may accept these arguments and refuse to give issue class settlements or judgments preclusive effect.

The absent class members of an issue class seeking monetary damages would have a potentially powerful argument that certification violates their due process rights. As this Court has explained, as "part of our deep-rooted historic tradition that everyone should have his own day in court," a "judgment or decree among parties to a lawsuit * * * does not conclude the rights of strangers to those proceedings." *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (internal quotation marks omitted). Accordingly, class actions "implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party." *Ortiz*, 527 U.S. at 846 (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). A properly certified class action satisfies due process because "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry*, 311 U.S. at 42-43). But issue class actions permit representative litigation without regard to one of the funda-

mental safeguards of absent class members' due process rights: the predominance requirement.

The absent class members of an issue class action have good reason to insist upon a showing of predominance. In *Amchem*, this Court explained that the "mission" of the predominance requirement—which winnows out classes in which the members' claims are riddled with factual and legal idiosyncrasies that defeat class unity—is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. In an issue class, however, the predominance requirement fades into irrelevance because all individualized issues have been severed. Because the predominance test was met by artificially limiting the inquiry to the remaining common issues, subsequent courts may sustain collateral challenges to the class judgment on the ground that the issue class was not "sufficiently cohesive to warrant adjudication by representation," thus violating the due process rights of absent class members. *Ibid.*

Due process concerns cannot be avoided through the expedient of certifying an issue class action under Rule 23(b)(2) instead. To the contrary, the absent members of these classes will also have a powerful argument that they cannot be bound by the judgment of a Rule 23(b)(2) issue class. Normally, "due process require[s] that the member[s]" of a class seeking monetary damages under Rule 23(b)(3) "'receive notice plus * * *, at a minimum[,] * * * an opportunity to remove himself from the class.'" *Ortiz*, 527 U.S. at 848 (quoting *Shutts*, 472 U.S. at 812). When the Rule 23(b)(3) class has been repackaged as an issue class under Rule 23(b)(2) seeking declaratory relief as to a limited set of elements of a claim for

monetary damages, however, the absent class members no longer are guaranteed notice and opt-out rights. See FED. R. CIV. P. 23(c)(2); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) ("By its terms subdivision [23](c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)."). Some courts may therefore conclude that a judgment in a Rule 23(b)(2) issue class action is not entitled to preclusive effect on the absent class members.

3. The businesses targeted by abusive issue class actions will not be the only victims. As noted above, the ease of obtaining class certification—and thus blackmail settlements—will encourage the filing of many more class actions. This avalanche of lawsuits will clog court dockets, adding to the workload of an already overburdened judiciary.

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling these lawsuits—not to mention potential litigation over collateral attacks on the judgments—will require business defendants to expend enormous resources. But these costs will not be borne by businesses alone. To the contrary, the vast majority of these expenses likely will be passed along to their customers and employees in the form of higher prices and lower wages and benefits.

* * * * *

In sum, the decision below dramatically waters down class certification requirements and thereby threatens to invite the filing of class-action lawsuits aimed at extorting blackmail settlements from the targeted businesses. But more so than the typical class action, issue class actions raise heightened con-

cerns because they are especially likely to be lawyer-driven and to deprive defendants of the safeguard of finality. In order to prevent a tidal wave of shake-down class actions, this Court should grant review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of the United States

PELLA CORPORATION, *et al.*,

Petitioners,

v.

LEONARD E. SALTZMAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, WINDOW AND DOOR MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN ARCHITECTURAL MANUFACTURERS ASSOCIATION, AND THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, WINDOW AND DOOR MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN ARCHITECTURAL MANUFACTURERS ASSOCIATION, AND THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The *amici* are associations representing a broad cross-section of American businesses, including product manufacturers and those engaged in the housing and construction industries, as well as parties representing the interests of consumers affected by overbroad class certification decisions. The *amici* and their members have a vital interest in this case because the Seventh Circuit's ruling significantly relaxes the standards for class certification, especially in product defect and consumer fraud cases. These standards protect the procedural and substantive rights of defendant product manufacturers and home

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), upon timely notice of the *amici*'s intent to file this brief, letters of consent to the filing of this brief by Petitioners and Respondents have been received and filed with the Clerk.

builders, as well as consumer class members. If allowed to stand, the ruling will encourage an avalanche of new class actions, dramatically increasing the class action exposure of American businesses, and harming the long run interests of American consumers.

The National Association of Home Builders (NAHB) is a nonprofit trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are fostering a healthy and efficient housing industry and promoting policies that will keep safe, decent, and affordable housing a national priority. NAHB's membership is comprised of more than 800 affiliated state and local associations representing over 175,000 members nationally, which include contractors, subcontractors, developers and other related occupations that build houses, apartments, and condominiums for residential use. NAHB members construct approximately eighty percent (80%) of the new homes built each year in the United States.

The Window and Door Manufacturers Association ("WDMA"), founded in 1927, is the premier trade association representing the leading manufacturers of residential and commercial window, door and skylight products for the domestic and export markets. The association is focused on key member needs in the areas of advocacy, product performance, education and information, and facilitating business interactions and relationships in the fenestration ecosystem.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Chamber of Commerce of the United States of America (the "Chamber") is the nation's largest federation of business companies and associations, representing 3,000,0000 direct members and indirectly representing the interests of businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American businesses.

The American Architectural Manufacturers' Association (AAMA) is a trade association representing over 250 companies and 140 individuals in the fenestration industry. AAMA has been recognized for more than sixty years as the industry's ultimate source for selection, specification, application, and performance information for aluminum, vinyl, and wood fenestration products, including windows, doors, curtain walls, skylights, siding, and other products.

The Center for Class Action Fairness (the "Center") is a non-profit public-interest law firm that represents consumers pro bono in class action litigation across the United States by objecting to unfair class action settlements on their behalf. The Center makes no effort to engage in quid pro quo settlements for profit. Instead, the Center represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from class action attorneys. The Center has an interest in opposing overbroad class certification decisions, which can give putative class counsel unfair leverage *ex ante* to bring meritless class actions that hurt consumers' interests in the long run.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit's opinion raises serious questions concerning courts' authority to certify Rule 23(b)(3) and (b)(2) class actions with respect to narrow issues of liability when overall resolution of the class claims turns on predominantly individual questions. This decision deepens the existing circuit conflict concerning the propriety of "issue" classes, erodes Rule 23's procedural safeguards, and threatens a proliferation of class action litigation, all of which demonstrate the pressing need for this Court to grant review.

Rule 23(b)(3) damages class actions are importantly limited by the requirement that common questions predominate over individual ones. This requirement acts as a vital check against improvident class actions, and protects the rights of defendants and absent class members alike. The Seventh Circuit's opinion erodes these protections by allowing a court to artificially manufacture predominance by certifying a class with respect to only a few common issues, while disregarding individual liability issues. Specifically, the Seventh Circuit's decision authorizes class certification in a consumer fraud case where the class' claims involve some common issue concerning an alleged design defect, even where other elements of liability, including proximate causation and injury, are too individualized to permit class certification.

This decision will have far reaching implications for the construction industry and manufacturers in general, as it opens the floodgates to new product defect class actions previously thought uncertifiable. For example, construction of a new home involves the installation of thousands of building components, which are affected by the same individualized factors that the Seventh Circuit now holds may be ignored for class certification purposes. The opinion paves the way for certification in any case involving such components. Indeed, the Seventh Circuit's reasoning could be used to certify virtually any product defect case.

Moreover, the artificial bifurcation of "common" and "individual" issues in a narrow "issue" class

action raises serious questions about defendants' right to present every possible defense, including those that may hinge on individual issues. Certification of "issue" classes undermines the due process rights of absent class members as well, by eliminating the overall cohesion of interests that legitimates representative litigation. The complexities raised by these class actions also promise to create procedural nightmares for federal courts.

Equally troubling is the Seventh Circuit's approval of a nationwide (b)(2) "issue" class seeking declaratory judgments on subsidiary issues of liability, which will be governed by the substantive law of fifty different states. The Seventh Circuit's conclusion that (b)(2) certification was appropriate merely because the class seeks "declaratory relief" – without any analysis of state law differences or the need for individualized findings – opens the door to standardless certification of nationwide mandatory (b)(2) issue classes. This Court's review is needed to rein in this creative expansion of Rule 23(b)(2).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT CONFLICT CONCERNING THE CERTIFICATION OF "ISSUE CLASSES" UNDER RULE 23(b)(3).

By concluding that a limited "issue" (b)(3) class can be certified merely because the class claims raised a common question "of whether the windows suffer from a single, inherent design defect," Pet. App. 5a, the Seventh Circuit's decision not only deepens an existing circuit conflict about the propriety of limited "issue" classes, it threatens a sea change in class action law and practice in product defect cases. The implications of this decision will have far reaching effects on participants in the building and construction industry and product manufacturers, and on the due process rights of all participants in class litigation.

A. The Seventh Circuit's Opinion Paves The Way For Certification Of Any Product Defect Case.

Rule 23(b)(3) requires a court to "find[ ] that the questions of law or fact common to class members predominate over any questions affecting only individual members. . . ." Fed. R. Civ. P. 23(b)(3). The requirement of predominance plays a vital role in assuring that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without

sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee's Notes to Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(3).

Since the adoption of Rule 23(b)(3), the predominance requirement has proven a difficult hurdle in product defect cases, particularly when proximate causation turns heavily on individualized inquiries.[2] The reticence to certify product cases is even more pronounced when such claims are cast as consumer fraud claims, which commonly require individualized inquiry concerning reliance and causation. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996).

The Seventh Circuit's decision, however, invites courts to imagine away these individualized issues by simply excluding them from the scope of the certification order. The District Court and the Seventh Circuit both recognized that proof of causation in this case would require predominantly individualized inquires, because "wood can rot for many reasons other than

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[2] *E.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *In re N. Dist. of Calif., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982); *see also* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FED. PRAC. & PROC., § 1805, at 408-09 (3d ed. 2005) ("[M]ost courts confronted with Rule 23(b)(3) products-liability class suits have concluded that the standards of predominance and superiority are not satisfied and have refused certification.").

window design and is affected by specific conditions such as improper installation." Pet. App. 7a; *see also id.* at 61a ("Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration. . . ."); *id.* at 80a ("It is clear that in many instances, inspection will be required, and individual inquiries will predominate."); *id.* at 81a n.13 ("I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue."). Nevertheless, the District Court believed it could simply disregard those individualized questions by "declin[ing] to certify a class" on those issues. *Id.* at 61a.

The Seventh Circuit broadly endorsed the District Court's approach, observing that "[a] district court has the discretion to split a case by certifying a class for some issues, but not others. . . ." *Id.* at 7a. Accordingly, the court found "the individual issues that necessarily arise in a consumer fraud action would not prevent class treatment of the narrow liability issues here" concerning "whether the windows suffer from a single, inherent design defect leading to wood rot. . . ." *Id.* at 5a.

This decision has far reaching implications for the construction and manufacturing industries. Building a new home involves the installation and integration of thousands of component products, each potentially subject to class litigation under the Seventh Circuit's opinion. Because the performance of those components are interdependent and can be

influenced by a variety of situation-specific factors, like installation, climate, and architectural design, building component cases have often been found to be inappropriate for class treatment. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417 (E.D. La. 1997); *In re Stucco Litig.*, 175 F.R.D. 210 (E.D.N.C. 1997). Different building components may have different strengths and weaknesses, and a builder's choice of components in a particular home will typically reflect a considered judgment about the "fit" of the part for the needs and circumstances of a particular project. Nevertheless, the Seventh Circuit's opinion allows a district court to certify a class seeking an across-the-board declaration that a component is "inherently" defective, without consideration of these contextual factors. This decision not only vastly increases the exposure of the construction industry to class litigation, it ignores the reality of how the industry functions.

The implications reach far beyond the construction industry, however. The Seventh Circuit's opinion opens the door to certification of nearly *any* product defect case and promises to bring about a wave of new product defect class litigation. At a sufficiently high level of generality, *any* product defect case can be said to present a "common" question relating to product design. District courts, relying on the Seventh Circuit's opinion, could feel justified in certifying this narrow question, even if the underlying claims were predominantly individual ones on the whole. The

Seventh Circuit's opinion thus threatens to make the district courts in that circuit a magnet for product defect class actions.

Relaxing class certification standards imposes dramatic costs on businesses. Even when a claim is not meritorious, class certification orders impose intense pressures to settle on defendants before trial, because the prospect of massive liability that comes with a certified class action often makes it prohibitive to litigate. *See, e.g.*, *Castano*, 84 F.3d at 746. "These settlements have been referred to as judicial blackmail." *Id.* The costs have ripple effects throughout the economy, as litigation costs may be passed on to customers in higher prices, or may force producers to withdraw beneficial products from the market altogether. *See* Michael Moore & Kip Viscusi, *Product Liability, Research and Development, and Innovation*, 101 J. of Political Econ. 161, 174-75 (1993).

Class litigation, once initiated, can also cascade beyond the product manufacturer, spreading the costs and adverse effects to other segments of the business community. This is particularly true in building materials and component cases. Certification of a massive class action against the component manufacturer has the potential to draw legions of builders, installers and other third parties into the litigation to resolve affirmative defenses, elements of liability, or third-party claims concerning improper installation, comparative negligence issues, and indemnity. *See Lienhart*, 255 F.3d at 147 (discussing complexities raised by role of builders and installers raised by

certifying defect claims against manufacturer of stucco siding).

The Seventh Circuit's opinion demonstrates the need for this Court to address the growing divergence among the circuits concerning the appropriate interpretation of Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." *See Hohider v. UPS, Inc.*, 574 F.3d 169, 200-01 n.25 (3d Cir. 2009) ("The interaction between the requirements for class certification under [Rule 23(b)(3) and] Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts.").[3] The Fifth Circuit, in another product defect case, has firmly stated that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano*, 84 F.3d at 745 n.21. "[A]llowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.*

Other circuits, however, have adopted a broader view of Rule 23(c)(4)'s provisions concerning

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[3] *See also In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 444 (4th Cir. 2003).

certification of "issue classes." The Second Circuit has suggested that "courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). The Ninth Circuit has echoed that view. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."). The Seventh Circuit's casual endorsement of "issue" class certification on narrow questions concerning the alleged presence of a product defect – notwithstanding its acknowledgement that injury, causation and damages present predominantly individual questions – takes this view to its logical extreme.

B. Certification Of An "Issue" Class Impairs Defendants' Rights To Present A Defense.

Certification of narrow "issue" classes also invites courts to make artificial divisions between common and individual issues, which deny a defendant the opportunity to present valid individual defenses that bear on classwide claims. It is a well-established principle that "[d]ue process requires that there be an opportunity to present every available defense."

Lindsay v. Normet, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). This due process principle is implicated when the aggregation of claims through the procedural device of a class action changes the proof required for class members to obtain relief, or deprives defendants of the opportunity to present individualized defenses to particular class members' claims. *Phillip Morris USA Inc. v. Scott*, ___ S.Ct. ___, 2010 WL 3724564, at *1 (Sep. 24, 2010) (Chambers Opinion); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998). "[C]hanges in substantive duty can come dressed as a change in procedure." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990).

Certification of "issue" classes on subsidiary questions of liability invites courts to dissect "common" questions from what are otherwise individual claims, ignoring the inevitable extent to which elements of liability overlap. *Cf. In re Fibreboard Corp.*, 893 F.2d at 712 (common issues cannot be created by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"). At the class phase of the proceeding, a defendant may be prevented from presenting evidence concerning elements of liability deemed to be "individual" questions, even though that evidence may overlap with the so-called "common" element. This procedure unfairly undermines a defendant's ability to present a full defense on the common issue.

This is particularly true in product defect cases. Questions about the presence of an "inherent design defect" cannot fairly be severed from individualized consideration of whether the alleged design flaw was the actual and proximate cause of any injury to any individual plaintiff. The "requirement that a plaintiff prove both causation and damage" is part of what "defin[es] the duty owed by manufacturers and suppliers of products to consumers." *In re Fibreboard Corp.*, 893 F.2d at 712. Preventing a defendant from presenting evidence on individual questions of causation impairs its ability to defend the question of defect.

In this case, for example, the plaintiffs' "defect" theory is that the design of Pella's Proline windows resulted in a marginally higher rate of wood rot than if an alternative design had been chosen. The "defect" inquiry therefore asks whether the design of Pella's windows, *in general*, can cause wood rot. In an individual trial setting, a defendant might rebut such a claim with evidence that the plaintiff's particular injury was not caused by design choices, but by other factors. Such evidence – while addressed to the "individual" element of "causation" – would still be *relevant* to rebutting an inference that the design of the product was not up to the warranted standard.

But the District Court expressly excluded individual causation issues from the class phase of this trial. This procedure places a defendant like Pella in the nearly impossible position of having to prove that its design was not "defective," without being able to

contest whether the design caused any specific failures. This effort to separate the "general" causation question presented by the common "design defect" inquiry from the "specific" causation inquiry can only create confusion and prejudice. *Cf. In re Paxil Litig.*, 218 F.R.D. 242, 249 (C.D. Cal. 2003) (noting that proposal to separately try "general" and "specific" causation "provides few benefits and incurs the heavy risk of confusion and prejudice").

It is not a sufficient answer to say that a defendant may raise such individual evidence in a follow-on proceeding. While the defendant can present that evidence to rebut a finding of individual causation, the defendant nonetheless is precluded from using it to create doubt in the jury's mind on the issue of "defect." And evidence rebutting individual causation may be received by a follow-on jury in a very different light if there has already been an adjudication that the product is "defective." As a practical matter, moreover, once there has been an adjudication that an entire product line is "inherently defective," settlement pressure on a defendant will likely be well-nigh irresistible, making the opportunity to present evidence in individual proceedings a hollow safeguard.

C. Permissive Certification Of "Issue" Classes In (b)(3) Actions Compromises The Due Process Rights Of Absent Class Members.

Certification of narrow "issue" classes in cases where individual issues predominate on key liability questions also implicates the due process rights of absent class members. Class actions are a limited exception to "the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). The class action exception may be justified if the unnamed class member "has his interests adequately represented by someone with the same interests who is a party," but "the burden of justification rests on the exception." *Ortiz*, 527 U.S. at 846 (internal quotation omitted). The Rule 23 requirements therefore "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

A core purpose of Rule 23(b)(3)'s predominance requirement is to assure the presence of this "cohesion that legitimizes representative action." *Amchem*, 521 U.S. at 623. Allowing a court to "manufacture predominance" through the use of Rule 23(c)(4)

"issue" certification permits class certification where this cohesion is lacking. *Castano*, 84 F.3d at 745 n.21. Even where the class' claims involve one or more common issues, individual differences on other issues may result in widely divergent interests among class members in the outcome of the litigation and present differing strengths and weaknesses of their claims. These differences call into question whether the class, as a whole, is sufficiently cohesive to justify permitting a self-appointed class representative to control the claims of persons who are not before the court.

Thus, it is not sufficient to simply require, as some courts have, a finding that "issue certification would . . . 'reduce the range of issues in dispute and promote judicial economy.'" *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (quoting *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001)). Judicial economy is not the only purpose of the predominance requirement, a fact that courts endorsing "issue" class certification have overlooked.

D. "Issue" Class Certifications Create Procedural Quagmires For Federal Courts, For Which No Clear Solution Has Been Offered.

There is also good reason to question the assumption that certification of narrow liability issues can *ever* promote judicial economy when common issues do not predominate overall. More likely,

"attempts at piecemeal certification of a class action . . . ultimately result[ ] in unfairness to all because of the increased uncertainties in what is at stake in the litigation and whether the litigation will ever resolve any significant part of the dispute." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 n.17 (5th Cir. 1998).

An "issue" class trial would be an extraordinary procedure, with no clear analogues in American jurisprudence. The procedure contemplates adjudicating sub-issues of liability that, by themselves, do not create a judgment of liability, much less a final judgment. Just what class members are supposed to do with the resulting inchoate "issue" judgments is rarely considered. The lower courts' opinions in this case are no exception.

For example, the District Court offered no insight as to whether it intended to conduct all of the needed individual follow-on proceedings itself, or whether it envisioned issuing only a partial judgment to the class, which class members would take to their own districts or state courts and enforce with separate litigation. *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 719-23 (2003) (discussing different models of issue class adjudication). Each of these models presents enormous procedural challenges.

The notion of issuing partial "issue" judgments to be enforced in separate suits filed in other jurisdictions raises numerous questions, such as whether

the special verdict would be immediately appealable and, if not, whether it would be reviewable following the judgment in individual proceedings. *See In re Paxil Litig.*, 218 F.R.D. at 248 (noting court "has found[ ] no precedent for this trial methodology"). The latter would call into question the uniformity value of a classwide issue judgment, and the former raises questions about the operation of the final judgment rule. Also, if class members must initiate their own follow-on lawsuits in their home fora with new counsel, the cost of initiating those proceedings may be nearly as prohibitive (in the case of negative value suits) as the cost of ordinary individual litigation would be.

If the class court intends to adjudicate all of the individual follow-on proceedings itself, a different set of problems is presented. It is difficult to describe as "efficient" or "economical" a process whereby hundreds of thousands of class members in six states must be haled to a single district court in Illinois to prove up their individual issues of injury, causation, and damages. While it is tempting to propose imaginative solutions, like various kinds of special master proceedings, these solutions must take into account the defendants' rights to a jury trial on individual issues that might result in damages verdicts. *See Cimino*, 151 F.3d at 316.

Any interpretation of Rule 23(b)(3) that permits classwide resolution of partial liability questions, leaving significant liability issues for follow-on individual

litigation, must consider these vital questions. To date, no court has done so.

II. THE SEVENTH CIRCUIT'S OPINION SETS A DANGEROUS PRECEDENT FOR CERTIFICATION OF A NATIONWIDE MANDATORY (b)(2) CLASS SEEKING ONLY PRELIMINARY DECLARATIONS OF LIABILITY.

This Court has warned of the "serious constitutional concerns raised by the mandatory class resolution of individual legal claims," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999), a concern that calls for caution before expanding the scope of Rule 23(b)(2). The Seventh Circuit's opinion is anything but cautious, however. To the contrary, the opinion approves a (b)(2) class with no precedent – a nationwide, non-opt out class seeking "declaratory relief" that amounts to nothing more than a partial adjudication of subsidiary liability issues, which are governed by fifty different states' laws. This ruling renders meaningless Rule 23(b)(2)'s requirements that a class seek "final" relief with respect to the class "as a whole." The Seventh Circuit's opinion therefore highlights the need for this Court to clarify that, while terse, the language of Rule 23(b)(2) does impose serious limitations on the scope of such classes.

A. The History And Purpose Of Rule 23(b)(2) Demonstrate The Need For Strict Construction Of The Rule's Requirement That The Class Seek "Final" Injunctive Or Declaratory Relief With Respect To The Class "As A Whole."

Rule 23(b)(2) permits certification of a class only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This limitation on the nature of the relief available to a Rule 23(b)(2) class is the primary safeguard for ensuring the cohesiveness of the class, and explains the absence from Rule 23(b)(2) of the more detailed Rule 23(b)(3) safeguards. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1157 (11th Cir. 1983); *Allison v. Citgo Petroleum Co.*, 151 F.3d 402, 413 (5th Cir. 1998).

Specifically, the "final injunctive or corresponding relief" contemplated by the Advisory Committee is a *unitary* injunction or declaration directing a defendant to change its conduct in a way that will automatically affect all members of the class *uniformly*, whether or not they are parties to the action. "The examples provided by the Advisory Committee illustrate that Rule 23(b)(2) applies only where the class treatment is 'clearly called for,' i.e., in situations where a court, through a single injunction or declaration, can redress 'group, as opposed to individual, injuries. . . . '" *In re Methyl Tertiary Butyl Ether*

Prods. Liab. Litig., 209 F.R.D. 323, 341-42 (S.D.N.Y. 2002) (quoting *Holmes,* 706 F.2d at 1155); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614 (1997); *Allison*, 151 F.3d at 413; *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 976 (5th Cir. 2000); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). Where such a unitary injunction is sought, "[o]pting out of a (b)(2) suit for injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of the judgment. A (b)(2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief." *Holmes*, 706 F.2d at 1157.

This limitation ensures that all members of the class will be affected the same way by the relief, and will have the identity of interests required for representative adjudication. *Allison*, 151 F.3d at 413. Thus, "even greater cohesiveness generally is required than in a Rule 23(b)(3) class." *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005).

B. A (b)(2) Class Cannot Be Certified Where Class Members' Claims Arise Under Fifty Different States' Laws.

Properly understanding the intent behind Rule 23(b)(2)'s limitation on remedies, it is inconceivable that a class whose claims for declaratory relief may be governed by fifty different states' laws could ever qualify for certification under Rule 23(b)(2). The

members of the (b)(2) class seek declarations concerning the scope of Pella's warranty obligations that will inevitably be governed by many different states' laws. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Under these circumstances, no "single injunction or declaration" can redress the plaintiff class' claims for purposes of (b)(2). *Holmes*, 706 F.2d at 1155. Different class members will have different entitlements to the declaratory relief sought, depending on the substantive state law governing their claims. Some states, for example, do not recognize any warranty claim for unmanifested defects. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 729 (5th Cir. 2007) ("[S]ome jurisdictions require that the alleged defect manifest itself regardless of whether the claim is brought under contract or tort."). Under these circumstances, class members' varying rights to relief implicate (b)(2)'s assumption of homogeneity of interests.

The Seventh Circuit opinion did not even reference the need for choice-of-law analysis with respect to the nationwide (b)(2) class' claims, despite expressly discussing the need for such analysis for the more limited six-state (b)(3) class. The opinion equates the absence of an express predominance requirement in (b)(2) to the absence of any need to consider state-law differences.

The implications of this decision are enormous. Under prevailing law, courts have consistently refused to certify nationwide Rule 23(b)(3) classes asserting state-law claims, because variations in state law destroy predominance. *See, e.g., Amchem*, 521

U.S. at 622; *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010); *In re Am. Med. Sys.*, 75 F.3d at 1085. The Seventh Circuit opinion resurrects the nationwide state-law class action under the auspices of Rule 23(b)(2). The risk of certification of a nationwide class, as opposed to the statewide classes that have increasingly become the norm under (b)(3), dramatically increases the "bet the company" nature of class action filings, magnifying the potential for plaintiffs' class action lawyers to obtain extortionate settlements that harm the interests of businesses and consumers alike.

C. Allowing Certification Of (b)(2) "Issue" Classes Requesting "Declarations" On Subsidiary Questions Of Liability Is An Abuse Of Rule 23(b)(2).

The text and purpose of (b)(2) also makes clear that a (b)(2) class cannot be certified to seek partial declarations of narrow liability "issues" that do not provide final relief to any member of the class. Certification of a (b)(2) class is inappropriate if relief would vary among class members or individualized inquiries are needed to establish entitlement to relief. *See Holmes*, 706 F.2d at 1157; *Hohider v. UPS, Inc.*, 574 F.3d 169, 200 (11th Cir. 2009).

The Seventh Circuit's opinion holds that Rule 23(b)(2) was satisfied because the "class would benefit uniformly from the declarations," even though it

recognized that the declarations would not create any automatic entitlement to relief since "only once the windows experience any manifest defect, if ever, will the class members be able to submit a claim to Pella for repair." Pet. App. 8a. However, the need for individual proof of causation and injury demonstrates that this relief is neither "final," nor beneficial to the class "as a whole." The benefit class members receive from this declaration will vary greatly, depending on such factors as whether their windows are still under warranty, or whether they are subject to a further defense for improper installation.

The reasoning of this opinion would permit certification of a (b)(2) class in every case, since any class that presents a single common issue on liability could claim to "benefit uniformly" from a favorable declaration on that issue. One cannot read the opinion and conclude that the requirements of "final" relief, or relief flowing to the class "as a whole," have any independent meaning, apart from the requirement that the class request "declaratory relief."

Ultimately, the (b)(2) class certified in this case is nothing more than a nationwide, mandatory version of the (b)(3) "issue class" certified for resolution of common subsidiary questions of liability, except that the court felt unconstrained to even consider how variations in state law or individual circumstance might apply to the plaintiffs' claims, given the absence of Rule 23(b)(3)'s specific procedural safeguards.

In *Ortiz*, this Court recognized the need to rein in creative efforts to expand the mandatory limited fund class action under Rule 23(b)(1)(B). 527 U.S. at 842. The Court recognized that although "the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept" than was contemplated by the Rule's drafters, "the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse. . . ." *Id.* at 842. Accordingly, the "prudent course" was to "stay close to the historical model" in order to "minimize[ ] potential conflict with the Rules Enabling Act, and avoid[ ] serious constitutional concerns raised by the mandatory class resolution of individual legal claims." *Id.*

This case likewise demonstrates that, while the absence of the explicit Rule 23(b)(3) safeguards may make Rule 23(b)(2) open to more creative interpretations and uses than originally envisioned, such expansion of Rule 23(b)(2) gives rise to "serious constitutional concerns" that compel this Court's intervention.

CONCLUSION

For these reasons, and for those stated by the Petitioners, the Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PELLA CORPORATION AND
PELLA WINDOWS AND DOORS, INC.,
Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, individually and on behalf of all others similarly situated,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioners Pella Corporation and Pella Windows and Doors, Inc. ("petitioners").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sec-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioners and Respondents, upon timely receipt of notice of PLAC's intent to file this brief, have consented to its filing. Petitioners have filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and Respondents' written consent accompanies this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

tor. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC members have an interest in the ruling below because the Seventh Circuit's apparent endorsement of "issues classes" as a back door around the Rule 23 predominance requirement will likely trigger an avalanche of class action litigation. If allowed to stand, the ruling thus has the potential to dramatically increase the class action exposure of PLAC's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a consumer class action with only one common issue: the consumers bought petitioners' windows, which are alleged to be defectively designed. In a per curiam opinion issued without any opportunity for merits briefing or oral argument, the Seventh Circuit affirmed an order certifying two classes of consumers – despite agreeing that individual issues predominated on the questions of causation and injury. In the Seventh Circuit's view, these admittedly individualized issues need not stand in the way of a limited trial on one "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment." *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010).[3] The court's erroneous ruling departed from the sound reasoning of several other circuits, which have expressly held that a court may not use "issues classes" to manufacture predominance where it is otherwise lacking.

This Court should grant review. The Seventh Circuit's ruling deepens an existing split between the

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[3] The district court had certified two classes: (1) a nationwide non-opt-out class under Rule 23(b)(2) of owners of "windows [that] have not manifested the alleged defect [or] whose windows have some wood rot but have not yet been replaced," and (2) a Rule 23(b)(3) "statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows exhibited wood rot and who have replaced the affected windows." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 487 (N.D. Ill. 2009).

Fourth and Fifth Circuits – which have held that issues classes cannot be used where predominance is otherwise lacking – and the Second and Ninth Circuits – which have allowed district courts to use issues classes to isolate common issues for trial regardless of whether the case as a whole satisfies Rule 23(b)(3)'s predominance requirement. Without this Court's intervention, federal court litigants will be subject to widely divergent class-certification standards based solely on where a suit is filed.

The Court's intervention is all the more appropriate because the Seventh Circuit joined the wrong side of the split. That court's decision should be reversed for at least three reasons. First, the Seventh Circuit's ruling is contrary to the text, structure and intent of Rule 23(b)(3), which expressly requires that a finding of predominance be made after accounting for "*any* questions affecting only individual members" – not simply those on which a court elects to focus in an issues trial. The trial court disregarded this requirement by dissecting the proposed class in order to find one issue that was ostensibly common, even though individualized issues predominated overall – and the Seventh Circuit erred in endorsing that circumvention of Rule 23(b)(3).

Second, the Seventh Circuit's ruling portends serious constitutional violations in this and other cases. Remarkably, the court ignored its own prior admonition that district courts must be careful to "carve at the joint" in slicing up class-action trials into common and individual phases. Otherwise, a subsequent jury may be called upon to reexamine facts decided by prior juries, in violation of the Reexamination

Clause of the Seventh Amendment. That is likely to happen here. After all, the only "common" issue identified by the courts below to be tried by a jury in the class trial is whether petitioners' windows are defective. But in order to resolve causation issues – i.e., whether the defect was the cause of any alleged damages – subsequent juries would almost certainly have to reach their own findings about the nature of the defect.

Third, the Seventh Circuit's loose approach to class certification is an open invitation for plaintiffs' attorneys across the country to patch together eclectic groups of claimants into proposed classes – free from any concern over whether common questions would predominate in litigating the class claims. If allowed to stand, the Seventh Circuit's decision will thus have destructive effects on businesses nationwide, as plaintiffs will flock to its district courts with similar class actions.

For all of these reasons, the Court should grant the writ.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS REGARDING THE PROPER USE OF ISSUES CLASSES.

Rule 23(b)(3) indicates that a class action may only be maintained where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to

other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(c)(4), on the other hand, states that "*[w]hen appropriate*, an action may be maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4) (emphasis added).[4]

Courts are divided over the precise relationship between the predominance requirement of Rule 23(b)(3) and the authorization of issues classes in Rule 23(c)(4). The majority view – and the better one – is that predominance must be satisfied with respect to the class as a whole before an issues class may be considered. *See* Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43 (6th ed. 2009) (collecting authority adhering to this "majority position"). The Fourth and Fifth Circuits subscribe to this view, as do many district courts. *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998) ("reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3)"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues"); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993) ("While . . . dis-

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[4] Although the Seventh Circuit opinion does not explicitly say that it is affirming certification of "issues classes" under Rule 23(c)(4), that is the practical implication of the ruling.

trict courts may separate and certify certain issues for class treatment, the 'subclass' on each issue still 'must independently meet . . . at least one of the categories specified in subsection 23(b)'"); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 190 (E.D. Pa. 2007); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 496 (E.D. Pa. 1997). As the Fifth Circuit succinctly put it: "district court[s] cannot manufacture predominance through the nimble use of subdivision c(4)." *Castano*, 84 F.3d at 745 n.21.

The other view – taken by the Second, Ninth and (now apparently) Seventh Circuits – is that district courts may use issues classes to isolate common issues regardless of whether common issues predominate in the class as a whole. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court . . . to isolate the common issues under Rule 23(c)(4)[ ] and proceed with class treatment of these particular issues").

Notably, even the circuits that have espoused liberal attitudes toward issues classes are in conflict with themselves. The Second Circuit, for instance, recently rejected certification of an "issues class" on the ground that it would do little to increase the effi-

ciency of the litigation. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (finding that issues classes would not "materially advance the litigation because [they] would not dispose of larger issues such as reliance, injury, and damages"). Similarly, the approach taken by the Seventh Circuit in *Pella* is in hopeless conflict with the Seventh Circuit's prior ruling in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), rejecting a similar issues trial. *See id.* at 1296-97 (reversing certification where trial judge used issues trial on general question of negligence as an alternative for Rule 23(b)(3), stating that the "innovative procedure" for streamlining the case "so far exceed[ed] the permissible bounds of discretion in the management of federal litigation as to compel . . . decertification").

In sum, "[t]he interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issues classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts." *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009). The Court should grant certiorari in this case and harmonize those "divergent interpretations."

II. THE SEVENTH CIRCUIT'S RULING IGNORES THE TEXT AND INTENT OF RULE 23, THREATENS CONSTITUTIONAL RIGHTS AND IMPERILS AMERICAN BUSINESS.

A. The Ruling Abrogates The Language And Intent Of Rule 23.

The Seventh Circuit's ruling that a class may be certified as to certain purportedly common issues – even in the absence of predominance – is premised on a fundamental misreading of the relevant Rules. The plain language of Rules 23(b)(3) and (c)(4) supports the view of the majority of courts that Rule 23(c)(4) is a mere "housekeeping rule" to be applied, if at all, once predominance is satisfied as to the entire cause of action. *See Castano*, 84 F.3d at 745 n.21.[5] Rule 23(b)(3) expressly requires that common issues predominate over "*any* questions affecting only individual members" – vesting no discretion in courts to use issues trials to reshape the predominance inquiry. Fed. R. Civ. P. 23(b)(3) (emphasis added). Its plain language thus unambiguously indicates that it applies to the entire cause of action.

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[5] This analysis applies equally to Rule 23(b)(2). The majority of the Circuits – including the Seventh Circuit – have expressly recognized that Rule 23(b)(2) incorporates a cohesiveness requirement, which, like the predominance requirement of Rule 23(b)(3), bars class treatment unless "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000); *see also, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 n.18 (3d Cir. 1998) (stating that under Rule 23(b)(2) it is "well established that the class claims must be cohesive"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006) (recognizing that a Rule 23(b)(2) class must be "sufficiently cohesive" for the class-action device to be employed); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (similar); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) (similar). Accordingly, a harmonious reading of Rules 23(b)(2) and 23(c)(4) similarly requires that courts assess whether the class as a whole is cohesive before any use of the Rule 23(c)(4) device is sanctioned.

The text of Rule 23(c)(4) does not purport to modify this requirement; to the contrary, it provides for issues trials only "[w]hen appropriate." And it does not purport to establish a separate set of requirements to guide the "appropriate[ness]" inquiry – strongly implying that issues trials are only "appropriate" where the other requirements of Rule 23 are satisfied. After all, had the drafters of Rule 23 intended to provide a stand-alone basis for class certification, they would have included the provision alongside the other Rule 23(b) subsections intended to do precisely that.

Any contrary reading of Rule 23 is nonsensical. The Seventh Circuit's reading, for example, would provide a free pass for every class action that contains a conceivably common question. This is not – and cannot – be the rule. If it were, courts would allow "automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21.

The Committee Notes confirm that the drafters never intended Rule 23(c)(4) to operate in derogation of the predominance requirement as to the cause of action as a whole. For instance, the Notes specifically instruct that the class action device be used only where predominance exists: "The court is *required to find, as a condition* of holding that a class action may be maintained . . . that the questions common to the class predominate over the questions affecting individual members." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966 amendment) (emphasis added). The Notes further state that "[a] court that is not satisfied that the requirements of

Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1)(C) advisory committee's note (2003 amendment). And, if this were not clear enough, the Notes to Rule 23(c)(4) indicate that an issues class "may retain its 'class' character only through the adjudication of liability to the class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966 amendment).

Commentators agree, moreover, that the provision should not be used as an end-run around the plain mandates of Rule 23. *See* Joel S. Feldman, *Attempting to Manufacture Predominance: Practical and Legal Concerns with Issue Certification Under Rule 23(c)(4)*, Class Action Litigation 2007: Prosecution & Defense Strategies (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 11372 (2007)); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 712 (2003). Rather, strict enforcement of the predominance requirement is necessary to ensure that class actions are conducted consistent with their purposes and with the substantive rights of the parties involved. After all, the class action procedure was devised to allow a single plaintiff to represent other individuals only when the representative plaintiff's claims have so much in common with all the other claims that the defendant's liability – or lack thereof – to the entire class can be fairly decided in a single proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958). The Seventh Circuit's decision, however, did away with the predominance requirement – and the fairness principles on which it is based – by welcoming through the "issues class" back door the very result

that it barred at the front: certification of a class in which liability ultimately turns on individualized factual issues.

In sum, Rule 23(c)(4) was intended to be a mere "procedural tool" to sever common issues – not a "vehicle to reach certification." *Blain*, 240 F.R.D. at 190. The Seventh Circuit's decision runs afoul of that intent. If allowed to stand, it would ultimately render the predominance requirement a nullity, by allowing certification of virtually any proposed class under the guise of an "issues class" – even where common questions do not predominate. Such a result would contravene the language and intent of Rule 23 – and set the stage for proceedings that are inherently unfair and, as discussed in the next section, violate the Seventh Amendment.

B. The Ruling Threatens To Violate The Seventh Amendment Bar On Reexamination Of Facts Tried By A Jury.

The Seventh Circuit's loose approach to "issues classes" also threatens to compromise litigants' core constitutional rights. Because class actions typically cannot be neatly separated into distinct issues, the facts and law that are relevant to the supposedly "common" issue will frequently overlap with the remaining issues that are to be tried individually. This, in turn, would force the second jury to reexamine the findings of the first jury. By welcoming "issues classes" with open arms, the Seventh Circuit has thus set the course for routine violations of the Seventh Amendment – as well as this Court's

jurisprudence regarding reexamination of factual findings by successive juries. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States.").

This Court's landmark opinion in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), cautioned that a partial retrial limited to particular issues "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In that case, the First Circuit found error in the district court's jury charge on the issue of damages as to the defendant's counterclaim, and it remanded for a partial new trial on damages only. This Court reversed, explaining that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

The courts of appeals have properly extended the principle annunciated in *Gasoline Products* to the bifurcation of class actions, warning district courts that they must be careful to "carve at the joint" when setting out to certify isolated issues for class treatment, while leaving individualized issues for later resolution by subsequent juries. *Castano*, 84 F.3d at 751 (quoting *Rhone-Poulenc*, 51 F.3d at 1302, with approval). Otherwise, separate juries considering overlapping issues will inevitably reach their own, potentially divergent findings on identical facts. *See, e.g., id.* Commentators have echoed these concerns

and approved the extension of *Gasoline Products* to the class-action context. W. Russell Taber, *The Re-examination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 Def. Counsel J. 63, 64 (2006) ("Yet perhaps the most significant obstacle to [issues classes] is the Constitution itself"); Feldman, *supra*, at 71 ("Perhaps the most significant problem with issue certification is the fact that it runs afoul of the Seventh Amendment's Reexamination Clause [where it] . . . causes a second jury to reexamine the findings of the jury that determined any common issues").

Application of the *Gasoline Products* rule in the class-action context furthers two important goals of the Seventh Amendment's bar on reexamination. First, overlapping factual and legal issues may confuse subsequent juries. *See Gasoline Prods.*, 283 U.S. at 500 ("Here the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."). Second, there is a risk of inconsistent jury verdicts. *See Castano*, 84 F.3d at 750-51 ("[I]f separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent"); *Rhone-Poulenc*, 51 F.3d at 1303 ("How the resulting inconsistency between juries could be prevented escapes us.").

Contrary to its careful approach in *Rhone-Poulenc*, the Seventh Circuit's approach in this case throws caution to the wind, sacrificing important constitutional protections for the sake of imaginary expediency. Issues classes are fraught with reex-

amination risks – particularly where, as here, predominance is lacking as to the case as a whole. In this case, for instance, the district court plans to limit the "issues" jury to consideration of the factual and legal issues pertaining to alleged window defects. But even if a defect is found, how could a second jury decide whether the alleged defect caused any injury to any individual without some examination of the nature of the defect itself? A class member might have a leaky window, but is the leak caused by a defect in the window, or something else? And even if it is caused by a defect, is it the same defect that is "common" to the class? These questions cannot be answered without revisiting the first jury's findings.[6] Ultimately, "[n]o matter how carefully a judge attempt[s] to structure an issue class or craft special jury interrogatories to avoid overlap between factual issues, the sheer number of individual issues present in the absence of predominance as to the cause of actions as a whole [] create[s] confusion and uncertainty among jurors in the second (and subsequent) juries as to their proper role." Feldman, *supra*, at 74. Thus, in this case – and the many certain to follow – an "issues" trial could not be held without an unconstitutional reexamination of facts.

C. Loose Class Certification Standards Create Grave Risks For American Business.

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[6] Alternatively, there is a substantial risk that the second jury would simply assume that because a first jury found the product to be defective, every class member's window problems were caused by the alleged defect. That would be grossly unfair to the defendants, further highlighting the inherent problems of loosening certification standards for "issues" classes.

Finally, review is needed because the relaxation of class certification requirements contemplated by the Seventh Circuit's ruling in this case will incite potential plaintiffs – and their counsel – to file frivolous suits in the district courts of the Seventh Circuit (and beyond), creating a new opportunity for abusive class actions. This, in turn, will have widespread negative repercussions on American businesses and industries.

Pella has already been touted by plaintiffs' counsel as an invitation to file class action lawsuits that would not have previously been certified in the Seventh Circuit. *See* Aaron M. Zigler, *Pella v. Saltzman: The Seventh Circuit throws class certification objections out the window*, July 1, 2010, *available at* www.jdsupra.com (stating that "[u]nder *Pella*, it is clear that the existence of substantial individual issues will not defeat class certification"); Freed & Weiss LLC, "Firm Resume," *available at* www.freedweiss.com (listing *Pella* among the "notable cases" on its "firm resume" and noting that the Seventh Circuit authorized district courts to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues").

Lest there be any doubt, prior history reveals that the invitation will be accepted. As one commentator has noted: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings . . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997). By allowing

meritless class actions to hide behind the veil of "issues classes," the Seventh Circuit is thus poised to become a destination for consumer fraud and other similar class actions that would have been rejected under prior class certification standards. The onslaught of baseless suits, moreover, will crowd out legitimate legal grievances, raising the overall costs of litigation and jeopardizing the fairness of the legal system. *See Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (noting that "windfalls" awarded to plaintiffs bringing frivolous claims may cause those who actually suffered injury to receive "insufficient compensation").

Beyond these judicial costs, the Seventh Circuit's embrace of loose certification standards will have serious repercussions for American businesses. It is broadly recognized that loose certification requirements raise the stakes of litigation and the risk of gargantuan verdicts – not to mention bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, Regulation 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so"). This is so regardless of the merits of the case; "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."

Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases, and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, culminating in "judicial blackmail." *See* David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009); *Rhone-Poulenc*, 51 F.3d at 1298 (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); *Castano*, 84 F.3d at 746 ("These settlements have been referred to as judicial blackmail."). Abrogation of the predominance requirement substantially increases these risks to American business.

Finally, and most ironically, by inviting questionable consumer fraud class actions, the Seventh Circuit's ruling threatens to disrupt the free flow of commerce – to the ultimate detriment of consumers. This is so because the risk of bet-the-company class actions results in higher prices at the supermarket, the car dealership and the shopping mall – and can even force companies to scale back operations or stop selling valuable products. *See* Towers Perrin, 2009 Update on U.S. Tort Costs Trends 3 (2009) (reporting that the tort lawsuit industry cost Americans $254.7 billion in 2008). For this reason too, the Court should

grant certiorari, lest Seventh Circuit courts become the next haven for class action abuse, to the detriment of our judicial system, our economy and American consumers.

CONCLUSION

For the foregoing reasons, and for those stated by petitioners Pella Corporation and Pella Windows and Doors, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Corporate Members Of The Product Liability Advisory Council

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